

Gl. Brit. Courts
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R E P O R T S

OF
A D J U D G E D C A S E S

IN THE COURTS OF

Chancery, King's Bench, Common Pleas,
and Exchequer,

From Trinity Term in the Second Year of King GEORGE I.
to Trinity Term in the Twenty-first Year of King GEORGE II.

Taken and Collected by the Right Honourable

Sir JOHN STRANGE, Knt.

Late MASTER of the ROLLS.

The THIRD EDITION, with Notes, and Additional References
To Cotemporary Reports and Later Cases :

By MICHAEL NOLAN, of Lincoln's Inn, Esq;
BARRISTER AT LAW.

IN TWO VOLUMES.

VOL. II.

L O N D O N :

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AND R. PHENEY.

1795.

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Hilary Term

12 Georgii Regis. In B. R.

Sir Robert Raymond Knt. Lord Chief Justice.

Sir Littleton Powys, Knt.

Sir John Fortescue Aland, Knt. } *Justices.*

James Reynolds Esq.

Sir Philip Yorke, Knt. Attorney General.

Sir Clement Wearg, Knt. Solicitor General.

Dominus Rex vers. Williams Major' de Helstone.

THE defendant was elected a corporator eight years ago, and an entry was made in the corporation books of his taking the oath of office, and the oaths of allegiance and supremacy: it was now moved for an information in nature of a *quo warranto* upon the affidavit of the town clerk, who swore, that he did not administer the oath of allegiance, though he made the entry in the manner it appeared to be. But the court would do nothing in it, after so long an acquiescence; and said it would be of dangerous consequence, to allow a town clerk to disqualify members by his own oath, contrary to the record (1).

Where there is an entry of administering oaths, there must be a recent prosecution if the fact be false.

(1) *Rex v. Mayor and Burgesses of Malmesbury*, 8 Mod. 55. S. P.

Dominus Rex *vers.* Allington, Recorder of Hertford.

If a justice convicts without summons, there shall go an information.

L. Raym. 1407.

Ante 630.

1 Sess. Ca. p.

353. No. 281.

S. C.

THERE being affidavit made, that no summons was had in the case of the *King* and *Venables*, the court granted an information against the justice who made the conviction (1).

(1) *Vide* *Rex v. Wykes, And.* removal without summoning the party. *Ante* 46.
238. S. R. for signing an order of

Case of the Prison of the King's Bench.

Rules of the prison enlarged till prison repaired (1).

THE prison being in a ruinous condition, and the late rains having broke in, there was an order made for the proprietors to attend the court; and upon their attendance the court was moved to enlarge the rules of the prison, so as to take in the *Marshallsea*, that the prisoners might be removed thither. But the court would do nothing in it, till there was an undertaking by rule of court to put the prison in repair, which they said the proprietors were obliged to do, upon pain of forfeiting their right. Whereupon the proprietors submitted to a rule, and the rules were enlarged accordingly.

(1) *Vide* two rules for ascer. King's Bench Prison, *East.* 30
taining the boundaries of the *Geo.* 3. 3 *Term Rep.* 583.

Between the Parishes of Kinver and Stone in com' Stafford.

Renting a coney warren is a settlement.

Salk. 536.

2 Sess. Ca. p.

114. No. 109.

UPON a special order of sessions, it was stated, that a poor person rented a coney warren and a cottage upon it at 10*l.* *per ann.* which the justices were of opinion did not gain him a settlement within the statute of *Car.* 2. *Sed per curiam.* A mill has been held to be a tenement within that statute, and why not this? It is his ability to pay 10*l.* *per ann.* that is the foundation of the settlement, and whether he pays it for a house for habitation, or for a warren which brings him in a profit, is not material: the order of sessions must be quashed (1.)

(1) *Rex v. Piddletrentbide,* 3 *Term Rep.* 772. S. P.

Harrison *vers.* Winchcombe.

STRANGE moved for leave to plead *non assumpsit*, and *non assumpsit infra sex annos*, and cited *Folkes v. Smith* in C. B. Mich. 12 Geo. where there was the like rule; and in the principal case it was ordered accordingly.

Mich. 13 Geo. *Bristow v. Woodward* granted again on my motion. *Eodem termino Toepfen v. Elking* the same rule (1).

(1) *De Costa v. Carteret*, post. *Whelpdale v. Atkinson*, Fort. 377. 389. *King v. Boswell, Barnes* is contra. *Fortescue J. dissentiente.* 329. acc. *Adm. Garnett v. Harrison*, ib. 348. *Stritburst v. Graeme*, 2 Black. 723. But *Et vide Baker v. Westbrook*, post. 949.

Dominus Rex *vers.* Buck.

[679]

STRANGE moved to quash an indictment for killing a hare, this not being a matter indictable, the statute of 5 Ann. c. 14. appointing a summary proceeding before justices of the peace; and cited *Rex v. James, Trin. 1 Geo.* where an indictment for keeping an alehouse was quashed, because the statute 3 Car. 1. c. 3. had directed a particular remedy. *Et per curiam*, The indictment must be quashed.

Indictment lies not for killing a hare. 1 Sess. Ca. p. 370. No. 295.

Parker *vers.* Stanton.

TO the *scire facias quare executio non* upon a writ of error, the plaintiff in error pleaded, that the damages recovered were levied upon a *fieri facias*. And Strange moved to set aside this plea, saying it was never the intent of the court to give the party a liberty to plead to it, when it was only a method used to bring in the party to assign his errors; and that if this was to be once allowed, it would be done in all cases, and be an effectual method to get one term extraordinary upon every writ of error, by obliging the party to go to trial upon an issue to the *scire facias*, whilst the writ of error stood still for want of an assignment of errors. And he cited *Elmes v. Martin* in B. R. Hil. 10 Geo. where a plea of payment (which is the same in reason with the present case) was set aside. The Chief Justice at first made a difficulty of setting aside this plea, because it might be true, and then why should the party be brought in to shew cause

Practice in errors. L. Raym. 2414.

why there should not be execution, when it has been had already. But the other Judges made no difficulty of setting it aside, on account of the apparent delay that it would introduce. And if execution has been had, the defendant may go on with his writ of error to obtain a restitution. So after great debate the plea was set aside. And in the debate of this case it was said by the court, and the secondary, that if issue had been joined on this plea, and it had been found for the defendant in error, he might have taken out execution, but could not *non pros.* the writ of error, till after a rule to assign errors (1).

Instrumentum ligneum well enough in trover.
Post. 309.

After this errors were assigned; and when the cause came on to be argued, it appeared to be an action of trover *pro duobus instrumentis ligneis, Anglice stands.* And it was objected by Fazzakerley, who cited *Cro. El.* 817. 1 *Lev.* 48. *Sti.* 327. that there was a proper Latin word for *stands*, and therefore *instrumentum ligneum*, which would serve for any thing made of wood, was too general: but the court held it well enough, and the judgment was affirmed.

(1) *Ante* 390.

[680]

Welsh *vers.* Craig.

Debt lies not upon a promissory note.
3 Mod. 373.
S. C.

DEBT upon two promissory notes and a *mutuatus*. And on demurrer to the declaration, I objected, that an action of debt would not lie: that before the statute no action at all lay upon the note, as a note, (*Salk.* 129.) nor did an *indebitatus assumpsit* lie on a bill of exchange (1). And the only remedy given upon the note by the statute, is the same that was before on an inland bill of exchange. And of this opinion was the court, and pronounced judgment for the defendant (2). But then it was observed by Serjeant J. Comyns for the plaintiff, that there was one good count upon the *mutuatus*, and the demurrer was to the whole. Whereupon judgment was given for the plaintiff, which I believe it will be difficult for him to enter, as to maintain it.

(1) *Hodges v. Steward*, *Salk.* 125. acc. *Kessebower v. Tims*, *Bills* 46. and the note. *B. R. E.* 22 G. 3. *contra.* (2) *Quere et vide Bayley*

Goswill *vers.* Dunkley.

IN account for a watch and sword delivered to the defendant, *ad mercandizandum*, he pleaded that he carried them to *Porto Bello*, and in order to keep them safe, till he had a convenient opportunity to sell them, he put them into the warehouse of the *South-sea* company, and that the warehouse was broke open by enemies, and the watch taken away and lost, and that the sword had likewise been taken away, *nisi* an *Englishman* had put it on and claimed it as his, and that the defendant was forced to come away before he met with the *Englishman* to get it again. And on demurrer,

In account a discharge to a common intent is sufficient.

It was objected by Serjeant *Whitaker*, that this was no good discharge; and he cited 1 *Roll. Abr.* 124, 125. *Yelv.* 202. 1 *Bull.* 101. for these goods were delivered to the defendant under a special and particular trust; and that he could not defend himself against the plaintiff's demand, by shewing that he had lodged them in a warehouse, which was a committing them to the care of a third person, in which case he will be answerable for the loss.

Reeve contra. Though this is a personal trust, yet he is not bound to keep them always about him. If he was robbed of them himself, it is a discharge. 1 *Vent.* 122. 2 *Lev.* 5. 5 *E.* 4. 4. 9 *E.* 4. 40. *Et per curiam*, This is *prima facie* a good account: if the warehouse was not a place of safe custody, that should have been replied: a robbery there is the same as if from his own person, for a bailiff *ad mercandizandum* is not obliged to keep the goods always about him. At another day Serjeant *Hawkins pro quer* endeavoured to maintain the action, but the court stood to their former opinion, and gave judgment *pro defendente*.

[681]

Short *vers.* King.

THE plaintiff declared in ejectment on one demise, to which there was Not guilty pleaded; but afterwards finding it necessary to add the demise of the trustees, he delivered a new ejectment on the double demise. Whereupon I moved to stay the proceedings on this last, till payment of the costs, and for notice where the lessors were to be found; and grounded my motion for the first part on Lord *Coningsby's* case, and for the latter on the common case of a *qui tam* (3), because here the lessor

Motion to stay proceedings in ejectment till payment of costs of a former, refused, as the second action was not vexatious (1). Granted until notice where plaintiff's lessor to be found (3). 2 *Barnard K. B.* 224. S. C. but not S. P. Ante 543.

(1) *Vide Hullock on Costs* 446. et seq.

(3) *Gynn v. Kerby*, ante 402. acc. *Braceby v. Dalton*, contra post.

(2) *Vat qui tam v. Green*, post. 704.

was to enter into a rule for costs. The court granted the last part, but as to the costs they said it was never done, but where it appeared the party was vexatious, or had run the defendant to a great expence, which was Lord *Cuning's* case, who came for a trial at bar on his new ejectment, after the former cause was ready for the bar, which was a matter of mere favour, in which they might make their own terms.

Dobs vers. Edmonds.

Necnon de eo quod after a *quod cum* is a positive charge.

L. Raym. 1413.

2 Show. 295.

Cro. Jac. 536.

THE plaintiff declared in trespass with a *quod cum*, and then went on to another trespass, which was introduced with a *necnon de eo quod, &c.* The verdict was *pro quer'* as to the last part, and *pro def'* as to the trespass under the *quod cum*. And it was moved in arrest of judgment, that the whole was but recital. *Sed per curiam*, We must not extend that exception, which has gone far enough already: the latter part is by way of positive charge, and the finding of the jury has cured it as to the first. The plaintiff must have judgment.

White versus Cleaver.

Where a plea is general *quod indemnem conservavit*, it must be shewn for cause that it does not say *how*. But it is good on general demurrer.

L. Raym.

1416.

3 Lev. 194.

183.

DEBT upon a bond conditioned to indemnify the plaintiff. The defendant upon *oyer* pleaded generally, *quod indemnem conservavit*, without shewing how. And on a general demurrer it was agreed the plea was ill before the act for amendment of the law, for that no issue could be joined upon it. 2 Cro. 165. Hob. 296. 2 Co. 4. 2 Cro. 363. 503. 634. But then it was objected, that this should have been shewn for cause of demurrer. And of that opinion was the court, for the substance is the saving harmless, and how that was done, is but matter of form; so the plaintiff prayed leave to discontinue upon payment of costs, which was granted accordingly.

[682]

Portman vers. Came.

Where executor must declare as executor, he shall pay no costs. L. Raym. 1413. cited in Andrews 357. Post. 1106.

THE plaintiff brought an action of debt upon a bond as executor, and upon *oyer* it appeared to be conditioned, "that the defendant should not hunt in any of the lands of the "testator," and in the replication, a breach was assigned by a hunting in the time of the executor; and a verdict for the defendant.

And

And now Serjeant *Chapple* moved for costs, because the hunting, which was the cause of action, arose in the time of the executor, and was matter within his knowledge. 6 *Mod.* 91. 181.

Lat. 274. 220.
Sec 3 Burr.
Rep. 1451.

1 *Vent.* 92. *Sed per curiam*, The cases are only where he needed not declare as executor; and so was *Baller v. Delander*, *Trin.* 1 *Geo.* in *B. R.* But here the bond was the cause of action, and he was obliged to declare as executor; and therefore they denied costs.

Lady Cals versus Title.

ERROR of a judgment in *C. B.* in ejectment on four demises of a different commencement and continuance: verdict for the plaintiff against two defendants only as to one third part of 28 acres of meadow; and as to the rest of the premises, and all the other defendants, Not guilty: upon which there is judgment, that the plaintiff should recover *terminum suum præd' de et in præd' una tertia parte præd' 28 acrarum prati* against the two defendants who are found guilty, and that the acquitted defendants shall recover 7*l.* costs.

Verdict incertain.

Upon this judgment the two defendants, who were found guilty as to part, bring a writ of error, and assign the general errors. And *Strange pro quer' in errore* objected, that the verdict and judgment are uncertain.

1. For that the plaintiff declares on four several demises of a different commencement and continuance, and yet the judgment is only to recover *terminum suum præd'* in the singular number, without determining which of the terms he shall recover. *Hil.* 4 *Geo. B. R.* *Hodson v. Backhouse*: the writ of error was *de quadam trans. et ejection' firme* instead of *firmarum*, there being two demises: and quashed.

2. It is impossible for the sheriff upon this judgment to know what he is to deliver possession of, for there are four demises of four different 28 acres of meadow, and whether the plaintiff is to have those which *A.* demised, or those which *B.* or *C.* or *D.* demised, is uncertain; it should have been to recover the 28 acres of meadow which the first, or second, or third, or fourth lessor demised. 1 *Book of Judgments* 74. 2 *Ditto* 119. 2 *Roll. Abr.* 694. 1 *Roll. Abr.* 779. By this verdict no body can say which of the lessors title is established, nor can either of them bring an action upon it for the *mesne* profits.

[683]

Whitaker Serjeant *contra* did not offer to answer the objections, but said they would try below and get it set right: at present he took an exception to the writ of error, that it was

Variance.

(a) Co. Ca. of
Prac. 10.

only to remove a record of an ejectment between the plaintiff and the two defendants who are found guilty; whereas it appears by the record, that there were eleven other defendants to the suit: and though the writ can be brought only by these two *ad grave damnum* of themselves, yet the suit must be described as it really was. *Et per curiam*, So it should, and the case of *Cook and The Dutchess of Hamilton* (a) was cited (1). Then *Strange* insisted, that it was amendable by the late act (2); and of that opinion was the court, so the writ of error was amended. And as to the objections to the judgment, it was adjourned, to give the defendant in error an opportunity to set it right if he could.

(1) *Brewer v. Turner*, ante 232. (2) 5 Geo. 1. c. 13. *Atkins v. Paine*, 2 *Ld. Raym.* 1532. *contra*.

Dent *vers.* Lingood.

How the entry
shall be where a
release of errors
is found.

THE defendant in error pleaded a release of errors, which was found for him; and the court ordered the entry to be, that the plaintiff should be barred of his writ of error, not *quod affirmetur* (1).

(1) *Cunningham v. Houston*, ante 127. S. P. *Vide also Davenant v. Rastor*, 2 *Ld. Raym.* 1046.

Between the Parishes of Westham and Chiddingstone.

Woman's settle-
ment before
marriage re-
mains, if hus-
band has no set-
tlement. *Fcl.* 288. 2 *Bott* 97. pl. 133. S. C. *Mich.* 1 *Geo. int. paroch.* *Dunswell and Upotery*, 3 *Sess. Caf.* 80. S. C. held so likewise. *Sess. Caf.* 104. S. P.

IT was stated, that a single woman settled at C. was married to a man who is since dead, but his settlement did not appear: *Et per curiam*, Her settlement before marriage stands (1).

(1) *Reg. v. Wilborough Green*, *Norton, Burr.* S. C. 122. *Rex Fel.* 249. *Shadwell v. St. John's* v. *St. Botolph Bishopsgate*, *ib.* 367. *Wapping, Andr.* 307. *Rex v.* S. P.

Hughes *vers.* Alvarez.

[684]

Writ of inquiry
amended.
2 *L. Raym.* 1409.
Cited by An-
drews 78.

IN an action upon the case upon two promises, there was judgment for the plaintiff as to the first promise, and as to the second a *nolle prosequi*. A writ of inquiry is taken out to inquire what damages the plaintiff had sustained *occasione premissorum*, and upon the return of this it was moved to amend the writ, and make it *occasione non performance pro ad prima promissionis*: and upon the authority of *Baker v. Cambell*, *Paf. 4 Ann.* in *B. R.* the writ was amended in this case, the record of the judgment by default being a warrant to amend by.

Haywys *vers.* Savage.

A Special *capias* by original was taken out returnable *crastina animarum*, and for want of a plea to enter before the effoin day of Hilary term judgment was signed the 19th of January, which was now moved to be set aside. And it was agreed, that if this had been by bill, the defendant would not have been obliged to plead till within Hilary term. But I insisted, that it being a special *capias*, wherein the whole case was set out at large, it made it more reasonable, than where there is only a common *capias de placito transgressionis*. And it has been always taken to be for the expedition of the plaintiff, to sue out these special writs: whereas if this judgment be set aside, it will be putting them upon the same foot with a common *latitat*. The fact and practice was certainly on my side, but the court, out of a disinclination to favour proceedings by original, would not allow there was any difference, but set aside the judgment: so that now there is no advantage in taking out a special *capias*, and therefore I suppose it will be discontinued.

Upon a special *capias* by original the defendant shall not be obliged to plead sooner than upon a common *latitat*. Tidd. Prac. K. B. 243.

Helbut *vers.* Held.

ERROR of a judgment in C. B. after verdict for the plaintiff. And it was assigned for error, that Edward Richier, who was sworn as a juror returned upon the principal pannel, was never returned by the sheriff; and also that there was diminution in the record, for want of the *venire facias* and *habeas corpora*. And to this in *nullo est erratum* was pleaded.

No error to be assigned contrary to the record. L. Raym. 1414.

Parker *pro quer* in errore objected, that in *nullo est erratum* was a confession of the errors assigned, and then no doubt but that in point of law the swearing a person upon the jury, who was never returned by the sheriff, will make such an error in the proceedings, as will overthrow the judgment. 5 Co. 42.

[685]

Strange *contra*. I admit that where a matter of fact properly assignable is assigned for error, in *nullo est erratum* will be a confession; but where the matter alleged is not by law assignable, there in *nullo est erratum* is a demurrer in law; it is insisting the

Where a fact properly assignable for error is assigned in *nullo est erratum* is a confession of the fact (1). But where it is not so, it is a demurrer in law. (2)

(1) Vide Hopkins v. Wigglesworth, 2 Lev. 38. Yelv. 57. Jac. 521. 2 Roll. Rep. 53. Jent. 332. S. C. Yelv. 58. Cole v. Green, 1 Lev. 311.
(2) Hudson v. Banks, Cro. Jac. 28. S. P. Haydon v. Minn, Cro.

party

party has no right to assign such a matter for error, and that therefore the defendant ought not to be drawn into an inquiry about the truth of it. And I take it the error here alleged is not assignable, as being contrary to the record: for after the joinder in issue, the record goes on to the award of a *venire facias* returnable at such a day, *ad quem diem* says the record, *jurata inter partes præd^a ponitur in respectu* till the next term, *nisi prius* the Chief Justice comes to *Guildhall*: at which time he comes, *et juratores unde infra fit mentio exacti unus eorum*, (that is, one of those returned by the sheriff) *viz. Edwardus Richier ven^o et in juratam illam juratus existit*: so that the record expressly says, that the *Edward Richier* who was sworn, was one of them that was returned by the sheriff; and therefore the error assigned is contrary to the record: and that such an error is not assignable, I rely on 1 *Roll. Abr.* 758. pl. 8. If *A. B.* is sworn upon the principal pannel, and another of the same name is sworn upon the *tales*; it shall not be assigned for error, that the *A. B.* first sworn and *A. B.* the *tales* man were one and the same person, so as to make it a trial by eleven jurors only; for that this (says the book) is contrary to the record, which says that they who were sworn upon the *tales* were *alii de circumstantibus*: he could not be *idem* consistently with the record, which says that he was *alius*: and therefore such an averment, contrary to the record, is not to be admitted.

As to the diminution alleged, I shall make no difficulty after a verdict, of admitting even that there are no such writs at all.

Et per curiam, The case in *Rolle* is exactly in point, and according to the reason of the law in other cases: therefore the judgment must be affirmed.

[686]

Dominus Rex *vers.* Popplewell.

In conviction
for swearing the
oaths must be
set out.
1 Sess. Caf. p.
356. No. 283.
S. C.

CONVICTION for profane cursing and swearing was quashed, for want of the particular oaths and curses being set out (1).

(1) *Rex v. Sparling*, ante 497. S. P.

Anonymous.

Mandamus
to churchwardens
to call a
vestry to elect
churchwardens
refused,

STRANGE moved for a *mandamus* to be directed to the church-wardens of *St. Botolph Bishopsgate*, commanding them to call a vestry in *Easter* week, for the election of churchwardens: but

but the court refused it, saying there was no instance of such a *mandamus*, and they could not take notice who had a right to call the vestry, and consequently did not know to whom it should be directed (1).

(1) *Mandamus* to churchwardens to make a rate for repairs of a parish church denied. *Rex v. Churchwardens of St. Peter's Church, 5 Term Rep. 364.*

Dominus Rex vers. Betts et al'.

TO a *scire facias* on the crown side upon a recognizance for keeping the peace, the defendant as to the breach assigned pleaded Not guilty, but concluded with an averment, instead of concluding to the country; and after a demurrer, I moved to amend the plea: and the court gave leave to amend it accordingly.

Amendment on the crown side.

Dominus Rex vers. Pappineau.

THIS was a writ of error directed to the justices of the peace of the county of *Surrey*, to remove a conviction for a nuisance upon an indictment setting forth that the defendant such a day, *Super quandam rivum sive aqua cursum ibidem vocat' Wandle prope adjacent' et contigue adjungen' communi alta via Regia ibidem vocat' Tooting-Lane, necnon prope separales domus mansionales diversorum ligorum et subdit' dicti Domini Regis, erexit et edificavit quandam molam deperere coria (Anglice to dress hides) et macerare cutes ovium in aqua (Anglice to steep sheep skins in water) et quod præd' (def') apud molam præd' deperavit et maceravit triginta cutes ovium magnum foetorem et insalubrem odorem emittentes, et easdem cutes in quodam loco ibidem prope communem altam viam Regiam præd' posuit et locavit, per quod aer ibidem maxime corrumpebatur et adhuc corruptus et infectus existit ad commune nocumentum, &c.*

2 Sess. Ca. p. 34. No. 39. S. C. Indictment for a nuisance, laying it to be committed near the highway, and also near several dwelling houses, &c. is sufficient.

(1) Where a nuisance is temporary, as the steeping stinking hides, &c. there need not be judgment that it be abated (2).

After not guilty pleaded a trial is had, and the defendant found guilty; upon which the judgment of the court is entered, that the defendant be fined 100*l.* for the said nuisance, *et capiat' &c.* Upon this judgment the general errors are assigned, and the coroner and attorney pleads *in nullo est erratum.*

[687]

(1) *Rex v. White and Ward*, 1 Burr. 333. S. P.

(2) *Vide Rex v. White*, 1 Burr. 338.

Strange pro querente in errore argued, that this should be reversed. And his first objection was, that as it was laid, it was not a fact indictable, it not being laid to be *in* but *near* the highway, for the *per quod aer ibidem* must refer to the erection, which is laid to be upon a rivulet *near* the highway, and if it be not *in* the highway, an indictment will not lie. *Sed per curiam*, Surely this is well enough. If a man erects a nuisance *prope adjungen* to the highway, *per quod* the air thereabouts is corrupted; it must in its nature be a nuisance to those who are in the highway, and therefore the indictment is well enough.

Then I went on to another objection, (and which I principally relied upon) that the judgment was erroneous for want of an adjudication that the nuisance be abated. The end of the law in giving an indictment for a publick nuisance is, to have the whole removed by one suit, and to avoid a multiplicity of actions. And it is preferred before an action upon the case, because in that each party can only recover his separate damages, whereas upon an indictment there may be an end of the thing at once. By these indictments the publick inconvenience is to be removed, which can be no other way effected, than by a judgment to abate the nuisance; for as to a fine, the publick is never the better for that, and a man in many cases may find it worth his while to pay a fine, and continue the nuisance, in which case the publick has no redress.

In the case of the *King v. Walcot*, which was an attainder for high treason, the words *ipso vivente* were omitted, and that was held a sufficient error to reverse that attainder; and yet that is not in so material a part as this; for there being a judgment that he should suffer death, (which is *extremum supplicium*) it was but an omission in the form; but the court said that the common law having made that part of the judgment, it was not in the power of the court to omit it: in this case the principal judgment that the law has appointed is, that the nuisance be abated, to which the court may add the further punishment of a fine; but unless they give judgment to abate the nuisance, the publick is no better for this prosecution, but there must be a multiplicity of actions, which it is against the policy of our law to admit, where it may be prevented. The interest of the publick is so great, that in *Salk.* 458. it is held, that for the concern of the publick an act of general pardon shall take away the fine, but not the abatement. And an indictment for a nuisance is not good, unless it concludes *ad commune nocumentum* of the King's subjects: which shews that the removing the common nuisance is the chief end of the indictment.

There

There are few precedents to be found of these judgments entered at large. *Bro. Nuisance* 39. it is said how the judgment ought to be, which is an abatement and a fine; and in the *Old book of Entries* 144. b. in an assize of nuisance for diverting a watercourse the entry is, *quod nocumentum præd' amoveatur et trenchæ præd' obstruatur.*

And it is no objection to say, that this is an error for the advantage of the defendant. It was for *Walcol's* advantage to have that painful circumstance omitted, but the court would not take that into consideration, and held it ill, as varying from the judgment which the law had appointed. If upon an indictment for murder the defendant should have judgment to be whipt; will any body say this is a good judgment, and yet surely it is for the benefit of the defendant.

Fazakerley contra. Every judgment must be according to the circumstances of the case. This is not a permanent, but a transitory nuisance, in dipping of skins, and I do not know how that is to be abated: we may trust the court in setting such a fine as will be as effectual as an abatement: the defendant may have left off dipping his skins, and that is all the abatement the thing is capable of.

C. J. Regularly the judgment ought to be, to abate so much of the thing as makes it a nuisance. 9 Co. 53. *Godh.* 221. *Winch* 3. If a house be built too high, so much of it as is too high shall only be pulled down (3). The cases cited by Mr. *Strange* were of a permanent nuisance; but here erecting the mole is not the nuisance, (for it might be lawful to do that) but the nuisance arises from the use he puts it to. If a dye-house, or any stinking trade were indicted, you shall not pull down the house where the trade was carried on. I think here could be no judgment to abate any thing, and therefore the judgment must be affirmed.

To which *Powys J.* agreed. *Et per Fortescue J.* The question is, whether in the case of a publick nuisance it is not necessary to give two judgments in all cases. I am not satisfied this is not a permanent nuisance; the erecting is the cause of the nuisance, and the conclusion of the indictment *ad commune nocumentum* goes to the whole, as well the erection as the dipping. I remember the case of a glass-house, where the judgment was to abate the nuisance, not that the house should be pulled down, but only to prevent his using it again as such; which might have

(3) *Cooper v. Marshall*, 1 Burr. 259. S. P.

been done in this case, to prevent his dipping skins again. *Co. Ent.* 92. b. 9 *Co. Batten's* case: it appears the plaintiff could not go on for damages after the defendant had abated the nuisance, which shews an abatement to be the most necessary part. 2 *Roll. Abr.* 84. And as no instance is given, where the judgment has varied in pursuance of the distinction now set up between permanent and transitory nuisances, I am of opinion that this judgment is erroneous, and ought to be reversed.

Reynolds J. I think the judgment is right. Every judgment should be adapted to the nature of the case: where the erection is the nuisance, there ought to be a demolition: roasting of coffee was formerly thought a nuisance, and yet no body ever imagined the house in which it was roasted should be pulled down: and what other way is there to abate such a nuisance? A glass-house is a nuisance in its own nature; but this is a lawful act, provided the skins which are dipt are not stinking skins. I should think it would have been going too far, if they had adjudged the whole erection to be abated for a particular abuse of it in dipping some stinking skins.

The Judges took further time to consider of it; and in *Trinity* term following it was mentioned again, and all standing to their former opinions, it was adjourned.

N. B. It was put in the paper about a year after, and no body appearing for the defendant, the judgment was affirmed.

Hasket vers. Strong. At the Rolls.

Third mortgage buying in the first should be prior to the second (1).

MR. *How* made a mortgage for 500 years, dated 9 June 1720, to *Neal*. He afterwards made a mortgage in fee to the plaintiff; and *Neal* assigned to the defendant, who afterwards advancing more money took a conveyance of the inheritance, with an agreement that the term should be kept on foot as an additional security: the term was never assigned over to a third person. And on the question touching priority it was agreed, that if the term had been regularly kept on foot, the defendant would have been in the common case of a third mortgagee taking in the first incumbrance to protect himself, by which he would have had the law on his side; whereas here the term was merged upon the grant of the inheritance, and therefore at law it would be with the plaintiff, who had the first mortgage

(1) *Vide Hayshaw v. Yates*, ante 240. and the note.

in fee. To which it was answered, and decreed by the court, that the plaintiff's conveyance of the inheritance interposing between the term and the defendant's grant, the grant of the defendant was void in law, the grantor having nothing in him; and then the term could not be merged in a void grant of the inheritance, and the defendant must be first paid his whole money. *Strange pro defendente.*

[690]

Southerton vers. Whitlock.

At Guildhall coram Raymond C. J.

IT was held, that if goods which are not necessities, are delivered to an infant, who after full age ratifies the contract by a promise to pay, he is bound: and he left it to the jury whether there was any confirmation of the contract at full age (1).

Infant bound by promise of payment at full age.

(1) *Per Holt C. J. in Hylling* 1 Term Rep. 648. *Cockshott v. Hastings*, 1 *Ld. Raym.* 389. *Bennet*, 2 Term Rep. 766. *S. P. Bortwick v. Caruthers*,

Lambell vers. Pretty John.

JUDGMENT was given in *B. R.* in trespass, and on error in the Exchequer Chamber the judgment was affirmed. The defendant then brought a writ of error *coram vobis* in *B. R.* which Mr. Parker moved to quash, and cited 1 *Vent.* 207. 2 *Lev.* 38. 3 *Salk.* 333. 3 *Keb.* 28, 29. that it will not lie after an affirmance.

Error *coram vobis* lies not after affirmance in Exchequer Chamber. 1 *Roll. Abr.* 735. pl. 16.

Belfield Serjeant insisted, the record never was removed from *B. R.* and that debt would still lie upon it. *Sed per curiam*, Before the statute of *Eliz.* we could not examine our own errors in fact after an affirmance in Parliament: and the Exchequer Chamber is now in the same degree with regard to us, as the Parliament was before. The writ of error must be quashed.

East-India Company vers. Pullen.

At Guildhall coram Raymond C. J.

If I lend my
servant with the
goods, the car-
rier is not liable.
(1)

ACTION against the defendant as a common carrier, on an undertaking to carry for hire on the river *Thames* from the ship to the company's warehouses. Upon the evidence it appeared, the defendant was a common lighterman, and that it was the usage of the company on the unshipping of their goods to clap an officer, who is called a guardian, in the lighter, who as soon as the lading is taken in puts the company's lock on the hatches, and goes with the goods to see them safe delivered at the warehouse. It appeared to be done so in this case, and part of the goods were lost.

[691]

The Chief Justice was of opinion, this differed from the common case, this not being any trust in the defendant, and the goods were not to be considered as ever having been in his possession, but in the possession of the company's servant, who had hired the lighter to use himself. He thought therefore the action was not maintainable, so the plaintiffs were nonsuited. *Strange pro quer.*

(1) 1 *Com. Dig.* Action against a common carrier (C. 1.) 299.

Price vers. Brown.

At Guildhall coram Raymond C. J.

Plan of payment
of the principal
and all interest,
supported by
proof of payment
of less, accepted
by plaintiff in
full.

UPON payment after the day and before bringing the action, it was pleaded to be a payment of the principal and all interest then due: on evidence it appeared a gross sum was paid, which upon computation did not amount to the full interest, but it was sworn that the plaintiff accepted it in full. I objected, that they ought to prove it as they had pleaded; but the Chief Justice thought it well enough, upon which there was a verdict. And the next term I moved on affidavits of the falsity of the defence, and that we did not expect any defence, and therefore were not ready to contradict the single witness who swore to the payment of the money. But the court would grant

grant no new trial, saying it would be of dangerous consequence, to suffer people to be setting up new evidence, after they knew what was sworn before.

No new trial where party might have had evidence on first trial (1).

(1) *Richards v. Syms*, 1742. *East India Company*, 3 Burr. 1216. Bull. L. N. P. 326. *Walker v. 1 Black. Rep. 295. S. C.* So also upon the discovery of a very material piece of written evidence in the custody of defendant's attorney at the time of the trial, but without his knowledge. *Broadhead v. Marshall*, 2 Black. Rep. 955.

Chambers *vers.* Robinson.

IN an action for a malicious prosecution of an indictment for perjury, the Chief Justice allowed the plaintiff to give in evidence an advertisement put into the papers by the defendant of the finding the indictment, with other scandalous matter, though an information had been granted for it as a libel, not (as he said) that the jury were to consider it in damages, but only as a circumstance of malice.

In action for a malicious prosecution, an advertisement put in the papers by defendant, pending the indictment, is evidence, though an information had been granted for it. 1 Barn. B. R. 22. S. C. but not S. P. Action lies for malicious prosecution of a bad indictment. Bull. L. N. P. 13. (1) Salk. 15. 10 Mod. 148. 214. Gilb. Cas. Law and Eq. 185. post. 978.

Upon the trial it appeared, the perjury was ill assigned, so that the now plaintiff could not have been convicted; and that exception was taken to it by the judge, and he was acquitted without examination of any witnesses. But the Chief Justice held the action lay, though it was a faulty indictment, relying upon the case of *Jones v. Gwynn*, where the distinction in *Salk.* 13. was denied, and held by the whole court that the action would lie, though the indictment was bad; a bad indictment serving all the purposes of malice, by putting the party to expence, and exposing him, but it serves no purpose of justice in bringing the party to punishment if he be guilty.

[*692] New trial granted for excessive damages, but the same damages being given a second time, another trial cannot be had.

Whereupon the jury gave the plaintiff 1000*l.* damages, and the next term the defendant moved the court for their judgment upon this point, (which was saved at *nisi prius*) and for leave to move for a new trial after the court had given their opinion upon the point, which was granted: and as to the point of law, the court made no difficulty of agreeing with the case of *Jones v.*

(1) *Wicks v. Fentum*, 4 Term Rep. 247. S. P.

Gwynn, and the defendant's counsel did not seem to think the reason and authority of that case was to be shaken.

Then the defendant moved for a new trial on account of the excessiveness of the damages; and the court said it was but reasonable he should try another jury, before he was finally charged with 1000*l*. So a new trial was granted upon payment of costs. And a new trial being had, the same damages were given again; upon which the defendant applied to the court, who said it was not in their power to grant a third trial; and so is *Salk*. 649. the case of *Clerk v. Udal* (1).

6 Mod. 22.

(1) *Asb v. Asb*, Comb. 357. the ground that the damages were not excessive. So also *Redshaw v. Brook*, 2 Wils. 405. *Bruce v. Rawlins*, 3 Wils. 61. *Ducher v. Wood*, 1 Term Rep. 277. *Leith v. Pope*, 2 Black. 327. *Benson v. Frederick*, 3 Burr. 184. In *Dove v. Martin*, Comb. 170. But in most of these cases the court admitted their power to grant a new trial for excessive damages in cases of costs; and see the cases cited in *Hayward v. Newton*, post. 940.

462

Where a new trial was refused on

Hurry v. Watson, Tr. 24 Geo. 3. 4 Term Rep. 659. n. acc. *Wood v. Gunston*, Styles 466. *Burr*. 364. *Lord Townsend v. Dr. Hughes contra. Atkyns J. dissente*, 1 Mod. 232. 2 Mod. 150. *Roe v. Hawkes*, 1 Lev. 97. *Welford v. Berkley*, 1 Burr. 609. *Chum v. Briggs*, cited *ib.* *Duberley v. Gunning*, 4 Term Rep. 651. *Contra Buller J. dissente*. *Vide Huckle v. Money*, 2 Wils. 205.

Easter Term

12 Georgii Regis. In B. R.

Sir Robert Raymond, Knt. Lord Chief Justice.

Sir Littleton Powys, Knt.

Sir John Fortescue Aland, Knt. } *Justices.*

James Reynolds, Esq;

Sir Philip Yorke, Knt. Attorney General,

Charles Talbot, Esq; Solicitor General,

Lorymer vers. Hollister.

THE bailiff, who had a writ against the defendant, came to Mr. Stapleton an attorney, and told him the defendant desired he would back the writ, and appear for him; and afterwards upon the plaintiff's attorney applying to him he told him he had sent orders to his agent to appear, and he believed he had done it. Whereupon the plaintiff's attorney delivered a declaration, and signed judgment for want of a plea. Upon motion to set it aside, it appeared the bailiff went of his own accord to Mr. Stapleton, without the direction of the defendant, and that Mr. Stapleton discovering this, had countermanded the orders for appearing, and that in fact there was no appearance. But the court refused to set it aside, and said they * would oblige Mr. Stapleton to file common bail according to his undertaking, in order to make the proceedings regular, there being no fault in the plaintiff's attorney. *Strange pro quer'.*

Where attorney undertakes to appear, the court will oblige him to do it in all events.

* Not unless attorney had signed, undertaking, writing it not sufficient. *Last.* 192, 193, and 2d. ed.

Noke *vers.* Windham.

Practice.

THE lessor of the plaintiff being an infant, the court obliged him to name a good plaintiff, who might be answerable for costs (1).

(1) *Anon.* 1 *Wils.* 130. *Tbrog-* 140. S. C. S. P. *Cases temp.*
morton v. Smith, *post.* 932. *Birch-* *Hard.* 51: *Thrustout v. Percival*,
man v. Noright, 2 *Barnard*, B. R. *Barnes* 193. *anon. Cowp.* 128.

Eden *vers.* Wills.

The *scire facias* in error must be returnable as the original process was.

L. Raym. 1417.

AN action was commenced in C. B. by writ of privilege, which was returnable at a day certain: after judgment for the plaintiff a writ of error was brought, and a *scire facias quare executio non* was taken out returnable at a general return. And upon motion to set it aside, the matter was stirred several times. And after consideration and search of precedents, the *scire facias* was set aside, for that it ought to pursue the nature of the first process: and whereas in the common case of actions by original in C. B. the process upon error in B. R. must pursue that, and be returnable at a general return; so where the proceeding below is by attachment of privilege, which is returnable at a day certain, the proceedings here must be returnable in the same manner. And a case was cited of *Vavasour v. Parker*, *Trin.* 11 *Ann.* (a). where it was so ruled. *Thes. Brev.* 121. The writ was quashed, but without costs (1).

(a) 19 *Vin.*
Abr. 288. c. 5.

(1) But in *West v. Sutton*, where returnable on a day certain, it a *scire facias* upon a judgment upon was held to be good. 2 *Ld.*
on an original in B. R. was made *Raym.* 853.

Courtney *vers.* Satchwell.

Fort. 380. S. C.
In trespass and false imprisonment defendant justifies under a process *que est eadem* &c. and traverses being guilty *aliter vel alio modo*: process *que est eadem* &c. and traverses being guilty *aliter* &c. it is ill on special demurrer (1).

IN trespass, assault, and false imprisonment, the defendant justifies under a process out of the sheriff's court in London, *que est eadem*, &c. and traverses being guilty *aliter vel alio modo*: process *que est eadem* &c. and traverses being guilty *aliter* &c. it is ill on special demurrer (1).

(1) *Vide* 5 *Com. Dig.* 457. *Pleader* (G. 12.) 457.

this the plaintiff demurs, and shews for cause, that the traverse is idle, and unnecessary. And upon argument the court were of opinion, that this was ill on a special demurrer, the *quæ eadem* being a sufficient traverse. *Lutw.* 1457. And so it was held in the case of *Carvil v. Manby* (a), where on a general demurrer it was allowed to be well enough; but the court said if it had been a special demurrer, it would have been otherwise. *S. C.* *fudicium pro querente.*

(a) Fort. 379.

8 Mod. 30.

Pr. C. Reg. 271.

S. C.

Lister *vers.* Baxter.

[695]

LISTER being master of a ship that was in distress at sea, put in at *Amsterdam*, and there borrowed 60*l.* of *Baxter* to repair the ship, and hypothecated it for repayment of the money. The money not being paid, *B.* libelled in the admiralty; whereupon a prohibition was moved for, on account of it's being a contract at land; and it not appearing by the words of the contract, that the ship was upon her voyage. it would be presumed she was only to begin her voyage from *Amsterdam*.

The master cannot hypothecate the ship before the voyage begins.

But the court was clearly of opinion, there should go no prohibition; it appearing by the libel, that the ship was upon her voyage; and if she was not, it might be pleaded below, which would oust the admiralty court of jurisdiction; the master having no power to hypothecate the ship in port, before she set out upon her voyage (1).

(1) *Justin v. Ballam*, 1 *Salk.* 1 *Vez.* 154. *Samson v. Bragg*, 34. *Watkinson v. Barnardiston*, *ginton*, *ib.* 443. *Wilkins v. Carr*, 2 *P. Wins.* 367. *Ex parte Shank*, *michael*, *Doug.* 101. 1 *Atk.* 234. *Buxton v. Snee*,

Sir Thomas Hales *vers.* Taylor.

THE plaintiff having brought an action against the defendant for diverting his water, the matter was referred to arbitration, and the arbitrators awarded the defendant to fill up a canal, restore the stream to its former course, and to do several other matters relating to his water-works. The plaintiff afterwards applied to the court for an attachment for non-performance of the award, and read several affidavits to prove it. The defendant on the other side read affidavits, to prove his compliance with the directions of the award. Whereupon the court said, it was discretionary whether they should enforce the award by an attachment; and there being a contrariety of evidence,

Enforcing an award by process of contempt is discretionary, and the court will not do it where there are contradictory affidavits as to the performance.

they would not determine it by affidavits, since the plaintiff was not without another remedy, by action upon the award.

Sullivan vers. Seagrave.

Ejectment lies
de parte domus
(1).

ERROR of a judgment in ejectment in *R. R. in Ireland de parte domus cognit' per nomen de le Three Kings in A.* And it was objected, that an ejectment would not lie *de parte domus*, and that the sheriff could not know of what part he was to deliver possession, and 2 *Roll. Rep.* 483. 11 *Co. Savill's case*, 4 *Mod.* 166. *Mo.* 702. *Lutw.* 974. *March 97.* *Salk.* 254. were cited.

[696]

But the court was of opinion, it was well enough, the situation of the house being sufficiently described, and the same certainty is never required in an ejectment as in a *præcipe*.

Record well re-
turned from
B R. in Hib.
although capital
'justic' infra no-
minat. omitted.
(a) Cited ante
316.

Then exception was taken, that the record was not well returned; the writ of error being directed to *William Witshed* Chief Justice, and the return is only by *William Wisbed* without adding capital 'justic' infra nominat' (a), which *Fortescue* Justice, thought a material objection, and mentioned the case of the *Queen vers. Somers 7 Anna*, which was a *certiorari* directed to the justices of the peace of *Oxon*, and the return was by two aldermen, without naming themselves justices. *Sed per C. J. and Reynolds J. (absente Powys J.)* here are the words *prout interius mihi præcipitur*, which are enough to shew him to be the same person to whom the writ is directed: so the record being well removed, the judgment must be affirmed.

(1) *Vide Goodtitle on the demise*, 621. *Goodtitle v. Walton*, post of *Chisler v. Alker & Elmer*, 1 834. and the cases there cited. *Burr.* 133. *Cottingham v. King*, ib.

Case of the Borough of Christ-Church.

No trial at bar
before issue
joined.

UPON a motion for a trial at bar, which was consented to on both sides, it appeared issue was not joined: and the court refused to grant it, saying it was below the dignity of the court to do it, till they knew whether the issue joined would be a matter of difficulty or not.

Anonymous.

A *Mandamus* was granted on Serjeant *Pengelly's* motion, to *Mandamus*.
 swear in a director of the Amicable Assurance, which is a
 company created by charter from the crown.

Ludwell *vers.* Hole.

AFTER verdict for the plaintiff, who laid himself to be a Gentleman, in an action for these words, '*You are a cheating old rogue, and have cheated the fatherless and widow.*' The judgment was arrested for want of shewing the defendant to be a trader, or laying any *colloquium* of his trade. 5 *Mod.* 398. 1 *Roll. Ab.* 62. *Hardr.* 8. *Raym.* 62, 169.

Words not actionable (1).
L. Raym. 1417.
 4 *Bro. Abr.* 491,
 493, 494. post.
 1169.

(1) *Vide Shurman v. Shelleto*, 3 *Burr.* 1688.

* *Vat qui tam vers.* Green.

* *Wyatt, n. 19*
2d ed.

IN a *qui tam* on the statute of usury, I moved to stay proceedings, till notice given of the plaintiff's place of abode: after the rule was served on the plaintiff's attorney, he sends notice in writing that the plaintiff was in *Switzerland*, and was going on with the action: upon which I moved a second time to stay proceedings, till the plaintiff's return from *Switzerland*, or security given for the costs, which is the reason the common rule is founded upon: And after hearing Mr. *Hussey* for the plaintiff, the court made a rule according to my motion, and security was given for costs (1).

[697]
Practice.
 12 *Ann. st.* 2.
 c. 16.

(1) In *Throgmorton v. Smith*, 1177. where a similar rule was granted in an ejectment brought under the direction of the court of Chancery, though a security for 40*l.* had been already given there for that purpose.
 2 *Kely.* 65. S. P. See also *Tasburne v. Kirsher*, 1 *Barnard.* 197. *Birchman v. Wright*, *Bull. L. N.* P. 111. *Cusack v. Jones*, *Say. Law of Costs*, 153. *Et Denn. ex dem.* *Lucas v. Fulford*, 2 *Burr.*

Rig *vers.* Wilmer.

Assignee of a commission may declare on a promise to the bankrupt (1).

ACTION by the plaintiff as assignee under a commission of bankruptcy; and the declaration was, that the defendant was indebted to the bankrupt, and being so indebted he promised to pay to the bankrupt; but throughout the whole declaration there was no *assumpsit* to the plaintiff the assignee.

On demurrer it was insisted on by the defendant, that the statute had transferred the promise to the assignee, and that a promise before made to the bankrupt was afterwards in point of law a promise to the assignee, and ought to have been declared on as such.

Sed per curiam, What reason is there to differ this from the common case of an action by an executor where you always declare on a promise to the testator, and yet the promise is as strongly transferred to the executor, as it is here to the assignee. Judgment for the plaintiff.

(1) *Parkins v. Wollaston*, 6 *Middleton v. Whitebread*, 2 *Show. Mod.* 131. S. P. *per Holt C. J.* 238.

Foot *vers.* Prowse. *Ante* 625.

A peremptory mandamus may go before any formal judgment.

[698]

Salk. 428.

(a) 1 Bro. P. C. 328.

THE judgment of the Exchequer Chamber, whereby the judgment given in *B. R. pro defendente* was reversed, being now affirmed in parliament, the plaintiff came and moved for a peremptory *mandamus*: insisting, that he had now falsified the return, and consequently set aside the defendant's excuse. To which it was objected, that no peremptory *mandamus* ought to go, unless besides the reversal of the judgment given for the defendant there had been also a new judgment given for the plaintiff; that a peremptory *mandamus* is a judicial writ, and must be founded upon some judgment establishing the party's right that applies for it. *Par. Ca. Philips v. Bury*, Salk. 431. 2 *Cro.* 206. *Yelv.* 74. 2 *Vent.* 295. *Paf.* 10 *Ann.* *Lidd v. Rodd*, Trin. 7 *Ann.* (a) *Hicks v. Sherburn.*

To which it was answered, that here was every thing done by the plaintiff that was possible for him to do, for he can have no new judgment, the Exchequer Chamber and House of Lords being confined only to reverse or affirm.

And the whole court were of opinion, that a peremptory *mandamus* ought to go; for this was not a judicial writ founded upon the record, but is a mandatory writ, which the court always grants, when they are satisfied of the parties' right: the reversal of our judgment is declaring the opinion of the superior court, that the plaintiff had a right; and there is no occasion for any new judgment. We every day grant peremptory *mandamus's* on producing the *posse*; which shews a formal judgment is not necessary. A peremptory *mandamus* was awarded.

Dominus Rex *vers.* Inhabitantes de Leofield.

AN order of removal whereby J. S. was adjudged likely to *Post.* become chargeable, without saying to the parish from whence removed, was confirmed (1).

(1) *Vide ante* 142, 393.

Dominus Rex *vers.* Warre et al'.

UPON demurrer to an indictment, the caption appeared to be, at a sessions held *ad festum Epiphaniæ* instead of *Epiphaniæ*: and it was insisted *pro defendente*, that this was a different time from that prescribed in the statute, for *Epiphanius* is in the Roman calendar, and was a bishop of *Salamis* in the time of the Emperor *Theodosius*: and the court held it ill, and gave judgment for the defendant.

2 Sess. Ca. p. 5.
no. 9. S. C.
Caption *ad festum Epiphaniæ*
ill. (1).

(1) *Hawk. P. C. ch. 25. sect. 127, 362. Et vide Rex v. Fearney,*
1 Term Rep. 316.

Mr. Delamotte's case.

HE was a justice of peace in *Kent*, and lived at *Black-beath* and in *London*. And being appointed constable in *London*, Serjeant *Chefhyre* moved for a writ of privilege, and cited *Cro. Car.* 585. But the court denied it, saying they had nothing to do with it, but the proper method was under the statute *Car.* 2. to apply to the sessions.

1 Sess. Ca. p.
344. pl. 271.
S. C.
No writ of privilege against a justice's being constable.
13 & 14 Car. 2.
c. 12. § 15.

2 Haw. P. C. ch. 10. § 39, 40, 41. p. 99.

Sifney *vers.* Nevinsont.

If in an action upon a bond defendant pays money into court under 4 & 5 Ann. c. 16. s. 13. he shall not pay the costs incurred, for the same cause in other courts (1).

(a) Cas. Temp. Hard. 368.

THE plaintiff had brought an action of debt upon a bond against the defendant as administratrix; and filed a bill in equity to discover assets; and had instituted a suit in the spiritual court, to oblige her to give in an inventory. After judgment for the plaintiff in the action, a writ of error was brought in *B. R.* and the judgment reversed: then the plaintiff brought a new action in *B. R.* And the defendant moved to stay proceedings, upon the act for amendment of the law, on paying principal, interest and costs. And now upon motion for the court's direction to the master in taxing the costs, it was insisted for the plaintiff, that the defendant ought to pay the whole costs of the first suit, the proceedings in Chancery, and the spiritual court, and the case of *Merril v. Joycelyn*, *Trin. 13 Ann.* (a) was mentioned for this purpose.

Sed per cur', We have nothing to do to order costs for proceedings in another court, which has a power to award costs, if the party is intitled to them; and as to the judgment, that is reversed, there is no reason why the defendant should pay for the error and mistake of the plaintiff. We are of opinion, the proceedings in this cause must be stayed on payment of the costs of this suit (1).

(1) *Salicrn v. Wynne*, *post.* 1072. *Lock v. Shermer*, *Cas. temp. Hard.* 116. *contra.*

Dominus Rex *vers.* How.

2 Sess. Ca. p. 31. no. 35. S. C. Indictment for words must specify what they were (1). *Vide* the resolution in *Dr. Saverell's case*. *St. Tri.* viii. 366.

INDICTMENT against the defendant, for that he *quendam Nich'um Carew, Baronettum*, being a justice of peace in the execution of his office, *per diversa scandalosa, minacia et contemptuosa verba abusus fuit, et ipsum in executione officii sui prædicti vi et armis illicite retardavit.* Upon demurrer to this indictment, it was objected by Serjeant *Darnall*, that it was too general, and that the words ought to be set out, that the court may judge whether they are indictable or not, according to the late cases of convictions for cursing and swearing, where the court has required the oaths to be set out.

(1) 2 *Hawk. ch.* 25. *sect.* 57, 331. 1 *Roll.* 79. (2) *Rex v. Popplewell*, *ant.* 686.

Strang

Strange contra admitted the indictment to be bad as to the words, but insisted that it was good as to the obstructing the justice in the execution of his office: and if any part of it be well laid, there shall be judgment for the King. Justices are indictable for neglecting their duty, and it is but reasonable to give them the same remedy against the obstructors. *Salk.* 380.

Et per curiam, If any part of the indictment was good, we should not give judgment for the defendant. But this is bad *in toto*. *Retardavit* will hardly warrant calling this an obstruction; but if it would, surely some act or other should be set out. *Judicium pro defendente*. [700]
2 Haw. P. C. ch. 25. sect. 59, 322. sect. 74, 332.

The King *against* the Inhabitants of Saint Mary the Virgin in Marlborough.

AN order was made upon the 33 *Eliz.* for a neighbouring parish to contribute *so long as we the said justices shall think fit*. *Et per curiam*, It must be quashed, for the discretion that is left in the justices is as to the *quantum*, and not as to the duration of the contribution.
2 Sess. Ca. p. 52. no. 55. 16 Vin. 416. 8 Mod. 344. Fol. 59. 3 Burn. Just. 692. S. C.

Dominus Rex vers. Travers.

At Kingston Lent Assizes 1726. coram Raymond C. J. de B. R.

THE defendant was indicted the last summer Assizes, for a rape upon the body of a child, then little more than six years old. And because the Lord Chief Baron *Gilbert* refused to admit the child as an evidence against him, he was acquitted.

What age the law will allow an infant to be a witness at. No distinction in this respect between capital and lesser offences.

But at the same Assizes an indictment was found against him for an assault with an intent to ravish the said child. And this indictment coming on now to be tried before *Raymond C. J.* the same objection was now taken by *Comyns* and *Darnall* Serjeants, viz. that the girl being now but seven years of age, could not be a witness: they insisted that it had formerly been held, that none under twelve years of age could be admitted to be a witness, and said that a child of six or seven years of age, in point of reason and understanding, ought to be considered as a lunatick or madman.

On the other side it was said, that in capital cases, which concerned life, this objection might be allowed; but in cases of misdemeanor

[701]

misdeemeanor only, as this was, such a witness might be admitted; they insisted that the objection went only to the credit of the witness; and *Hale's P. C.* says, that the examination of one of the age of nine years has been admitted: and a case at the *Old Bailey* 1698. was cited, where upon such an indictment as this, *Ward* Chief Baron admitted one to be a witness, who was under the age of ten years, after the child had been examined about the nature of an oath, and had given a reasonable account of it.

But *Raymond C. J.* held, that there was no difference betwixt offences capital and lesser offences, in this respect. And that a person who could not be a witness in the one case, could not in the other. The reason why the law prohibits the evidence of a child so young is, because the child cannot be presumed to distinguish betwixt right and wrong: no person has ever been admitted as a witness under the age of nine years, and very seldom under ten. At the *Old Bailey* in 1704. this point was thoroughly debated in the case of one *Steward*, who was indicted upon two indictments for rapes upon children. The first was a child of ten years and ten months, and yet that child was not admitted as a witness, before other evidence was given of strong circumstances, as to the guilt of the defendant, and before the child had given a good account of the nature of an oath. The second indictment against *Steward* was attempted to be maintained by the evidence of a child of between six and seven years of age: but it was unanimously agreed, that a child so young could not be admitted to be an evidence, and the child's testimony was rejected, without inquiring into any circumstances to give it credit. And it was merely upon the authority of *Hale's P. C.* where it is said, that a child of ten years of age may be a witness, that the other child of that age was admitted to be a witness in the first indictment. And in the present case, the child was refused to be admitted a witness. And there not being evidence sufficient without her, the defendant was acquitted (1).

(1) *Sed vide Brazier's case*, with the nature of the obligation of an oath. 12 Ap. 1779. *Bull. L. N. P.* 293. ed. 1790. where an infant of 5 years old was held a good witness by all the judges, she appearing to be acquainted

Bredon qui tam *vers.* Harman.

At Guildhall coram Eyre C. J. de C. B.

A former recovery not to be given in evidence on *nil debet* in a *qui tam*.
Strange proquer.

ACTION *qui tam* for not registering articles of apprenticeship according to the stamp act: the defendant pleaded *nil debet*: and upon the trial he offered in evidence a record of a recovery against

against him for the same forfeiture by another person, and so endeavoured to discharge himself by this under the plea of *nil debet*. And it was insisted for him, that if it appeared, that there was a recovery against him by another person for the same forfeiture, he was thereby discharged against all men, and owed nothing upon that account, and therefore it was very proper to give this record in evidence upon *nil debet*.

But Eyre C. J. denied this record to be given in evidence, and said the defendant ought to have pleaded it, if he would take advantage of it; for if it had been pleaded, the plaintiff would have been at liberty to have replied *nul tiel record*, or that it was a recovery by fraud to defeat a real prosecutor, which he could not be prepared to shew upon this issue.

[702]

Dominus Rex *vers*. Brotherton.

INDICTMENT for exercising the trade of a butcher on a Sunday. And exception was taken, that it was not laid to be *contra formam statuti*, and it was no offence at common law. But the court refused to quash it, and put the defendant to demur; and afterwards upon demurrer judgment was given for the defendant (1).

2 Sess. Ca. p.

224. no. 157.

S. C.

Selling meat on

a Sunday no of-

fence at common

law.

(1) *Vide Faulkner's case, Saund. 249. S. P.*

Trinity Term

12 Georgii Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice*,

Sir Littleton Powys, *Knt.*

Sir John Fortescue Aland, *Knt.* } *Justices.*

James Reynolds, *Esq;*

Sir Philip Yorke, *Knt. Attorney General.*

Charles Talbot, *Esq; Solicitor General.*

Dominus Rex *vers.* Rhodes.

Pending a suit in the spiritual court, touching the validity of a will, an indictment for forging it ought not to be tried.

Cited in 1 Willf. 75. and in St.

Tr. xl. 213.

219. 231.

Vide post. 776.

THE defendant exhibited a will in *Doctors Commons* as executor, and demanded probate; after a long contest there, it was determined in favour of the will; and upon appeal to the Delegates the sentence was confirmed.

Afterwards the parties who had been concerned in cooking up the will, fell out amongst themselves about the division of the estate; and thereupon it came out, that the will was forged, and upon full affidavits of the forgery a commission of review (which it was agreed was the only method to bring the matter over again) was granted by the Lords Justices; and an indictment was also found for the forgery, and stood ready for trial in *B. R.* Upon motion for a *habeas corpus ad testificandum* the Chief Justice declared, that he would not try the cause. For there being yet a sentence subsisting in favour of the will, and the validity of that being now put under a proper examination; he did not think it fitting to determine the property by an indictment, which would come on more properly after the sentence was reversed.

Trinity Term 12 Geo.

Dominus Rex *vers.* Davie.

ORDER of sessions for discharging an apprentice was quashed, the only reason given for the discharge being that the master declared in open court he would not take him again (1).

Apprentice not to be discharged without a reason.

1 Sess. Ca. p. 282. No. 232. S. C.

It was agreed to be a point not now to be disputed, but that the sessions had an original jurisdiction to discharge apprentices (2).

(1) *Rex v. Eafman*, post. 1013. S. P.

(2) *Rex v. Gill*, ante 142. S. P.

Dominus Rex *vers.* Smith.

THE defendant was convicted on an indictment for making great noises in the night with a speaking trumpet, to the disturbance of the neighbourhood: which the court held to be a nuisance, and fined the defendant 5*l.*

Nuisance. 2 Sess. Ca. p. 6. No. 20. S. C.

Dominus Rex *vers.* Lewis.

INDICTMENT in the grand sessions of *Anglesea*, for em-bracery. And it was moved *ex parte def.* for a *certiorari*. It was admitted, that in capital cases the *certiorari* lay by the 26 H. 8. c. 6. § 6. But it was contended for the prosecutor, that in cases of misdemeanor it had never been granted; of which the court would advise. And at another day several precedents were produced, and *posseas*, where the indictment removed from the grand sessions had been sent down to be tried in an *English* county, and returned up to *B. R.* therefore in this case there being an affidavit, to induce a suspicion, that a fair trial could not be had in *Wales*, a *certiorari* was granted (1).

Certiorari lies to *Wales* on indictment for misdemeanor.

1 Sess. Ca. p. 312. No. 244.

N. B. The affidavit was intitled *Rex v. Lewis*. And it was objected there was no such cause in this court. But the court said it was enough that there was a cause below between the *King* and *Lewis*, so the affidavit was read. At another day *inter*

How affidavits must be intitled.

(1) *Vide Rex v. Cowle*, 2 Burr. cases there cited. *Rex v. Griffith*, 834. 861. *Rex v. Inhabitants of* 3 Term Rep. 658. and the cases in *Clace*, 4 Burr. 2456. and the the note.

Regem et Jones.

Where there is a rule to shew cause why an information should not be granted, the affidavits should be intitled as between the King and the person moved against.

(1)

[*705]

THE affidavits on which an information was moved for had no title (which was agreed to be right) but the affidavits *pro def* on shewing cause were intitled. *Rex v. Jones*. And upon objection to the reading them, the court said, that there being a rule * in *B. R.* to shew cause why there should not be an information, that there was a proceeding in court between the King and *Jones*, and warranted the intitling the affidavits in that manner.

(1) "In the case of *Rex v. Robinson, Esq.* Trin. 5 Geo. 3. *B. R.* the affidavits produced by the defendant, in shewing cause, were not intitled. Mr. Dunning objected to the reading of them. But the court held that they might be intitled or not, on shewing cause, and the affidavits were read, and the rule discharged." MSS.

Rex v. Harrison, 6 Term Rep. 60, agrees with this case of *Rex v. Robinson*; and the present case does not contradict either, as it goes only to say, that intitling the affidavits shall not prevent their being read, in shewing cause against the rule nisi.—But *Rex v. Pierston, Andr.* 313. and *Bevan v. Bevan*, 3 Term Rep. 601, are contra.

Onslow *vers.* Booth.

Plea of privilege set aside.
Fort. 341.
Say. 19. S. C.

A Plea of privilege of clerk to a prothonotary in *C. B.* was set aside, the affidavit annexed to it being that *this is a true plea*, and not that *the plea is true*, the statute requiring the affidavit should establish the fact, and not the legality of the plea.

Braceby *v.* Dalton.

Practise.

IN an action upon the case Mr. *Wynne* moved on affidavit that the defendant did not know the plaintiff, that the attorney for the plaintiff might give an account who his client was, and where he lived. But the court refused it, saying it had never been done but in a *qui tam* (1).

(1) *Quære vide Gynne v. Kerby*, and the note ante 402, *Short v. King*, ante 681.

Powel' *vers.* Gay.

Practise.

IT was settled, that if the defendant craves *oyer* of any thing whereof he is intitled to have *oyer*, and it is not delivered in time; he shall have so many days to plead after the rules are out, as he demanded *oyer* before the rules were out (1).

(1) So shall the plaintiff where the defendant makes a protest. *Imp. Pract. K. B.* 243.

Frontin *vers.* Small.

N covenant, the plaintiff declares, that by deed made between her as attorney for *James Frontin* on the one part, and the defendant on the other part, she demised a house to the defendant, and that he covenanted to pay the yearly rent of 60*l.* to *James Frontin*, and then assigns a breach in non-payment of rent, *ad damnum* of the plaintiff, who was the attorney.

Where a warrant of attorney is given to execute a deed, it must be executed in the name of the principal.

The attorney cannot maintain an action upon it in his own name.

L. Raym. 1443. S. C.

Demurrer inde, and *Strange pro defendente* objected, that this is a void lease, and that no action can be maintained upon it, specially by the plaintiff who was but the attorney, and to whom the rent is not reserved: neither is it so much as a covenant *with the plaintiff*, but only generally *quod convenit* to pay the rent to *James Frontin*. The power is not pursued by a lease in the name of the attorney, for it ought to have been in the name of the principal. 9 Co. 76, 77. *Combe's case* is express, "If attorneys have power to make leases by indenture for years, they cannot make the indentures in their own names, but in the name of him who gave the warrant of attorney;" and 1 Roll. Abr. 330. 501. Godb. 389. Mo. 71. it is said such leases are void. A warrant of attorney in the nature of it is only giving another a power to set my name in my absence, but not to enable him to act as owner of the estate.

[706]

Reeve contra insisted, that the agreement that one shall procure an entry and enjoyment, and the other shall pay the rent, may be good, though the deed be void so as to pass an interest in the land: and the word *dimisit* is a covenant, upon which an action will lie. 4 Co. *Noaks's case*. And a lease may be good reserving rent to a stranger, who is no party to the deed; and so is 1 Mod. 113. *Et per curiam*, No doubt but in a good lease the rent may be so reserved, and that *dimisit* will amount to a covenant; but then that must be where the deed is valid, as this is not: and if on the one hand it be void so as to pass an interest in the land, it is but just on the other hand that it should be void as to the reservation of rent: especially in this case, where the covenant is not *with the plaintiff*, nor the rent reserved to her. Judgment for the defendant.

Chadwick *vers.* Allen.

UPON demurrer to a declaration on the following note, it was held to be a note within the statute; "I do acknowledge that Sir *Andrew Chadwick* has delivered me all the

VOL. II.

D

" bonds

" bonds and notes for which 400*l.* were paid him on account
 " of Colonel *Synge*, and that Sir *Andrew* delivered me Major
 " *Graham's* receipt and bill on me for 10*l.* which 10*l.* and
 " 15*l.* 5*s.* balance due to Sir *Andrew*, I am still indebted,
 " and do promise to pay." *Judicium pro quer.* *Strange pro*
defendente.

Manwairing *vers.* Sands.

In Middlesex coram Raymond C. J. de B. R.

Husband not
chargeable for
goods sold to
adulterous wife.
Salk. 116.

[707]

IN an action against the husband for a laced head sold to the
 wife; it was proved, that the wife lived from her husband
 in adultery, and that she told the plaintiff she had a husband,
 but that signified nothing, for she would pay him herself: the
 Chief Justice held the defendant not chargeable, and said he
 should have ruled it so, if there had been no actual notice, which
 only strengthened the case (1). *Strange pro defendente.*

(1) *Morris v. Martin*, ante 647. S. P. See *Bolton v. Prentice*, post
 1214.

Pepys *vers.* Sir John Lambert.

At Guildhall coram Raymond C. J.

Within what
time a note
ought to be de-
manded.

THE third indorsee of a promissory note kept it from the
 first of *November* to the seventh of *January* without re-
 ceiving it of the maker of the note: and in an action against the
 first indorsee, without notice, the plaintiff was nonsuited for his
 neglect. *Strange pro querente* (1).

(1) *Vide Syderbottom v. Smith*, 132. *Chamberlayne v. Delany*
 ante 644. *Coleman v. Sayer*, post. C. B. T. 7 Geo. 3. B. L. N. P.
 829. *Metcalf v. Hall*, B. R. 277. *Tindal v. Browne*, 1 Tan-
 T. 22 G. 3. B. L. N. P. 275. Rep. 167.
Doug. 515. *Hill v. Lewis*, Salk.

Dominus Rex *vers.* Edwards.

INDICTMENT for conspiring to marry a poor person settled in *A.* to a person settled in *B.* in order to bring a charge upon the parish of *B.* And on demurrer *judicium pro defendente*, because not an offence indictable (1). *Vide Salk.* 174. *Indictment on ne gijb. And. 174. 3 Mod. 320. 1 Sess. Ca. 336. c. 365, S. C.*

(1) *Vide Rex v. Tarrant*, 4 Burr. 2106. Where an information was granted against an overseer for this offence.

Wheeler *vers.* Thompson.

ON a motion for a prohibition, it was held that a carpenter may sue for wages in the Admiralty. 2 Vent. 181. *Salk.* 33. 1 Mod. 93. *Ship carpenter may sue in the Admiralty for wages.*

Jenkins *vers.* Purcel.

At Guildhall coram Raymond C. J.

WHILST the jury were swearing, the defendant's counsel called for the record, and finding a mistake in it, said they would make no defence. The plaintiff's counsel upon this, in order to avoid a nonsuit, and to save the costs, refused to pray a *tales*; and though twelve had been sworn, yet there having been no actual prayer of a *tales*, the cause was suffered to remain for want of jurors. *Practice at nisi prius.*

Turner *vers.* Turner.

[708]

In Canc. coram King Chancellor, 14th of May.

THE plaintiff being an infant, brings a bill in this court, by his *prochein amy*, to discover whether a will was cancelled by the defendant after the death of the testator, or by the testator himself. And upon the hearing, the court directed an issue at law, to try this point, and upon the trial of that issue, a verdict was found for the defendant. *Infant pays no costs on a bill filed by the prochein amy. 2 Will. Rep. 297. Sel. Cas. in Cha. 49. 2 Eq. Cas. Ab. 238. pl. 18.*

Upon the day of trial of this cause the *prochein amy* dies, and within a short time afterwards the infant comes of age, but does not proceed any further in the suit.

The defendant brings on the cause upon the equity reserved, and the plaintiff's bill was dismissed with costs (1).

Upon which the plaintiff obtained a re-hearing as to the point of costs. And for the plaintiff it was argued by *Talbot* and *Cowper*, that any person might bring a bill in this court in the name of an infant, which the infant could not discover whilst under age: that it would therefore be very hard to make an infant pay costs in a suit which might be commenced without his consent; and that it had never been the practice, unless the infant avowed the suit after he came of age, which made it his own act.

That the *prochein amy* was the person only relied upon for costs; and if at any time it appeared to the court, that he was not responsible for this purpose, the court upon motion would order a new one to be named, that was so (2): and in cases where it is necessary to examine the *prochein amy* as a witness in the cause, it can never be done till he is discharged from being *prochein amy*, and a new one named; because of his interest in the cause, in being subject to costs.

That they could not find one instance, where an infant under these circumstances ever paid costs: that they had searched the *subpœna* office, and found, that wherever an infant's bill was dismissed with costs generally, that the *subpœna* for costs was always made out against the *prochein amy*; from whence they argued, that the practice was to make him only liable.

[709] A *feme covert* when she sues by *prochein amy* may be subject to costs, but an infant is not; for a *feme covert* may at any time disavow the suit, which an infant cannot: and this they said was the distinction; and therefore insisted, that the plaintiff, in regard he had not prosecuted the suit after he attained his full age, should not be made subjects to costs.

For the defendant it was argued by *Lutwyche* and *Mead*, that the infant and *prochein amy* were both liable, and ought to be so, otherwise the infant might be as vexatious as he pleased: at common law the judgment is always entered against the infant, and the execution follows the judgment; so that at law the in-

(1) *Vide* the report in *Peere* Lord C. *Thurlow*, 2 *Cox's P. Williams*. *Wms.* 296. n. (1).

(2) *Quære vide Squirrel v. Squirrel*, 17 Dec. 1791. *coram*

fant here is liable to costs; and there being in this case both costs at law and in equity, a court of equity will not in such cases take from the defendant the remedy he has at law. It was admitted, that they knew of no precedent in this court, where the infant paid costs; and therefore they would argue from cases at law, which they said were equally founded upon reason as cases in equity: and the reason of the common law in subjecting infants to costs, was in respect of their interest in the matters in controversy. The *prochein amy* has not an absolute power to carry on a suit without an infant's consent; for upon application to the court on the behalf of the infant, suggesting that the suit is not for his benefit, the court will refer it to a Master, and if he reports it so, the court will stop the suit. The case of Lord Dudley was mentioned, where an infant would have controverted an account before a Master: but the court would not permit him to do it, till he had given security to answer costs; from which it was inferred, that an infant ought to be made liable to answer costs.

King Lord Chancellor. At common law no costs were given either to plaintiff or defendant; but the plaintiff found pledges *de prosequendo*, and in case it was found against him, he was amerced *pro falso clamore suo*.

Infants found no pledges at common law. The statute of Gloucester was the first statute which gave costs to demandants in real actions, and the power for infants to sue by *prochein amy* was first introduced by the statute of Westminster 2. It was made general, and Coke in his commentary upon these statutes says, that both guardian and *prochein amy* ought to be admitted by the court, and that no one can have a testamentary guardian for this purpose. I think it a proper power lodged in the court, that they may have responsible persons; for at common law, if the guardian lost the infants' land by mispleading, the infant could not falsify the judgment; but a writ of deceit lay to recover in damages against the guardian. I do not find that any case has been cited, where an infant plaintiff has been obliged to pay costs either at law or in equity: and in *Cro. Eliz.* 33. *Grave v. Grave*, Vide: Bulst. 189. an infant brought trespass by guardian, and was nonsuited; yet the court would not charge him with costs. And in another case 1 Bulst. 109. the court seemed to be of the same opinion.

And the Chancellor having enquired, what was the practice of the register, who said he had never known an infant liable in that court; he dismissed the bill without costs in equity, but left the defendant to recover at law, as he could.

Keilway *vers.* Keilway.

Coram King Chancellor, 19 May 1726.

How the estate shall be distributed where there is a wife, a mother and brothers, but no children.
2 Will. Rep. 344.
more full.
Gilb. Rep. 189, 190.
2 Eq. Ca. Ab. 441. pl. 47.
442. pl. 48.
3 Eq. Ab. 253.

R. *Keilway* died intestate possessed of a considerable personal estate, and without issue, leaving a wife, and several brothers and sisters, and his mother living.

The wife under the statute of *Car. 2.* takes a moiety; and a question arising upon the statute 1 *Jac. 2. c. 17.* how the other moiety should be distributed, whether the mother should have the whole, or only a distributory share with the brothers and sisters, and to have the opinion of the court, a bill was brought; and upon hearing the Lord Chancellor was clearly of opinion, and decreed, that the mother should have no more than a share of the other moiety in common with the brothers and sisters of the intestate (1).

(1) *Stanley v. Stanley*, 1 *Atk.* 455. S. P. upon the authority of this case.

Hill *vers.* Bateman et al.

Coram Raymond, Chief Justice, at Westminster.

Trespass and false imprisonment lies against a justice for committing upon a conviction for destroying game, where there was no attempt to distrain first.
2 Sess. Ca. p. 344. No. 270.
p. 371. No. 297.
S. C.
Warrant a sufficient justification to a constable in a matter within the justices' jurisdiction, secus where it is plainly out of it.
24 Geo. 2. c. 44.

THE defendant *Bateman*, being a justice of peace, had convicted the plaintiff for destroying game, and though (as it was proved) the plaintiff had effects of his own which might have been distrained, which were sufficient to answer the penalty he had incurred, yet the defendant sent him immediately to *Bridewell*, without endeavouring to levy the penalty upon his goods; and an action of trespass and false imprisonment being brought against *Bateman* for this commitment, the Chief Justice was of opinion, that the action well lay (1).

The other defendant was the constable, who had executed this warrant of commitment; and as to him it was agreed, that the warrant was a sufficient justification, it being in a matter within the jurisdiction of the justice of peace: but if a justice of peace makes a warrant in a case which is plainly out of his jurisdiction,

(1) *Vide Morgan v. Hughes*, 2 *Term Rep.* 225.

jurisdiction,

jurisdiction, such warrant is no justification to a constable. See 24 Geo. 2. c. 44. (2).

And it was agreed, that where actions of this kind are brought against justices of peace, they are obliged to shew the regularity of their convictions; and the informations, &c. laid before them upon which their convictions are grounded, must be produced and proved in court (2).

In these actions justices must shew th. regular proceedings.

(2) *Vide Sbergold v. Holloway*, 1002. 4 Com. Dig. tit. Imprisonment, (H. 9.) p. 375. Com. Dig. tit. Pleader, (3 M. 22.) (3 M. 23.) p. 796. (3) *Vide* the cases cited in *Crips v. Durdan*, Cowp. 642. So the officer in justifying himself under a warrant, must shew that he acted in obedience thereto. *Money v. Leach*, 3 Burr. 1742. *Lawson v. Clark*, cited *ib.* 1761. 1767.

Dominus Rex *vers.* Chipp:

THE defendant was convicted upon the statute 4 & 5 W. & M. c. 23. for destroying game; not being a person duly qualified.

Filmer for the defendant took several exceptions to the conviction.

4 & 5 W. & M. c. 23. If the information set forth in a conviction for killing game, states the defendant to be an inferior tradesman, without saying that he was a dissolute person, is sufficient. It need not state that defendant did unlawfully hunt, but it is otherwise in a conviction for deer stealing. If it set forth that the information was given to a justice of the peace, it need not say *ad tunc* a justice. 1 Sess. Ca. p. 372. pl. 298.

1. That the information, which was set forth in the conviction, was insufficient to warrant the conviction; for the information only recited that he was an *inferior tradesman*, but did not shew that he had *wasted his substance*, or that he was a *dissolute person*, which are the words of the statute; and therefore it did not appear by this conviction, that the defendant was such a person as was intended by the statute, for he might be an *inferior tradesman*, and yet have a sufficient estate to qualify him to hunt, &c.

2. That it was not any where set forth in the conviction, that the defendant did *unlawfully hunt*; and for any thing which appears in this conviction, the defendant might have bought the hare; and have hunted and killed it in his own yard, which would have been lawful.

3. That the conviction set forth, that information was given to such an one *justice of peace*, but did not say *ad tunc* a justice; and he might be a justice at present, and not at the time of the information.

D 4

But

But the court over-ruled all the exceptions; and to the first they said, that the statute was in the disjunctive, *viz. inferior tradesman or dissolute person*; and therefore saying that the defendant was either was sufficient.

[712]

To the second, the court said, that the statutes forbid such persons as the defendant to *hunt at all*, and made it criminal for such persons to *hunt generally*. And in this statute there is no distinction betwixt *lawful* and *unlawful hunting*, as there is in the statute against deer stealers; and they agreed, that in a conviction for deer stealing, it must be set forth, that the defendant did *unlawfully hunt*; but in the present case it need not, because there is no such distinction.

To the third exception the court said, that the conviction set forth, that information was made to such an one *existent un' justic'*, &c. which must be intended, that he was one at that time, and was sufficient without saying *ad tunc*.

And so all the exceptions were over-ruled, and the conviction confirmed.

Dawson et ux' vers. Myer Milr.

In the Exchequer Chamber.

What are mutual covenants.
7 Geo. II. 2. c. 1.

A Writ of error was brought in the Exchequer Chamber upon a judgment in *B. R.* in an action of covenant, in which the plaintiff declared, that in consideration of 730*l.* 10*s.* to be paid by the defendant, he (the plaintiff) covenanted on or before the 25 *March* then next, to transfer the produce of 634*l.* 7*s.* 6*d.* in lottery annuities subscribed by the plaintiff, and that the defendant covenanted to accept and pay; and the plaintiff set forth, that the company allowed 173*l.* 16*s.* stock upon the said annuities; and then sets forth, that he made a tender thereof to the defendant upon the day, and that the defendant refused to accept.

The defendant pleaded double, *viz.* that there was no tender, and that the contract was not registered. The plaintiff replied that the contract was duly registered, and offered an issue, to which the defendant demurred; and as to the defendant's plea that the plaintiff made no tender the plaintiff demurred.

And upon joinder in demurrer, the court of *B. R.* gave judgment for the plaintiff; for they said, that there were mutual covenants,

[713]

ants, viz. an express covenant from the defendant to pay the plaintiff 73*0*l. 10*s*. and then a distinct covenant from the plaintiff to transfer the produce of the annuities to the defendant; and the covenants therefore being mutual, they held that the tender was out of the case, and the plaintiff was not obliged to answer it; for if the plaintiff did not tender, the defendant had a remedy against him for not doing it.

A writ of error being now brought upon this judgment in the Exchequer Chamber, *Eyre* Chief Justice of the Common Pleas, *Alburt* Chief Baron, *Price*, *Page* and *Hale*, Barons, and *Denton* Justice, were unanimously of opinion, that the judgment of *B. R.* was right, and they affirmed it accordingly.

Fazakerley was of counsel for the plaintiff in error, but he not attending there was no argument.

And *Strange*, who was ready to argue it for the defendant in error, only opened the case, because the court were clearly of opinion for his client upon the first opening. But the cases upon which he relied as authorities were these,

Blackwell v. Nash, *Mich. 9 Geo. ante* 535. which was a covenant by the plaintiff to transfer stock to the defendant, and the defendant in *consideratione præmissor* covenanted to accept and pay for it; and the court held that the words in *consideratione præmissor* implied the covenant on the other side to transfer; and were held to be mutual covenants, and judgment *pro quer*, which was affirmed in the Exchequer Chamber, 1 *Saund.* 319. *Pordage v. Cole*.

The case of *Wyvil v. Stapleton*, *ante* 615. which was affirmed in the House of Lords, was to pay *proinde adtunc* at the time of the tender; which is different from this case, for the defendant's covenant is, to pay so much absolutely in satisfaction for the stock. The defendant here covenants to do two distinct acts, 1. to accept; 2. to pay; here is no *proinde*; and the words in *consideratione præmissor* relate only to the covenant on the other side to transfer, and not to the actual transferring,

If the covenant of the defendant *ad idem tempus solvere* is to be confined to his acceptance, then it gives him the liberty of avoiding one contract by the breach of the other. In the case of *Wyvil v. Stapleton* there were not the words *ad idem tempus*, and those words in the present case are to be construed to be the time the defendant agreed to accept the stock, and not the time the plaintiff does actually transfer.

He

Ante 623.

He had another exception to the defendant's plea, which was this; by the contract the plaintiff was to transfer the produce of the said annuities, with all dividends, profits, &c. and the plea only offers an issue as to the produce of the stock. So that it is putting that in issue, which if found for the plaintiff, will not establish the performance of the whole agreement on his part. This was as immaterial as the case of payment before the day, which has been often held ill, if found for the plaintiff. *Trinity 13 Ann. B. R. Merrill v. Jocelyn.* So in *Hob. 113.* in debt upon an obligation for the payment of 10*l.* 10*s.* the defendant pleaded payment of 10*l.* only, upon which they were at issue, and a replication was awarded, though the defendant had pleaded that he paid it *secundum formam conditionis.* But this exception did not come before the court for their opinion: and judgment was affirmed upon the first point.

Upon which affirmance a writ of error was brought returnable in Parliament, where after the case was settled, and I was ready to argue it, the plaintiff in error submitted, and paid the money.

Michaelmas Term

13 Georgii Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*

Sir John Fortescue Aland, *Knt.*

James Reynolds Esq.

Sir Edmund Probyn, *Knt.*

Sir Philip Yorke, *Knt. Attorney General.*

Charles Talbot, *Esq; Solicitor General.*

} *Justices.*

Castle vers. Richardson.

I BEL in the ecclesiastical court for not taking upon him the office of chapel-warden: the defendant pleads, that it is a donative, and thereupon moved for a prohibition. And upon debate the same was denied, the whole court being of opinion, that though there was a difference as to the incumbent, as to the parish officers there was none; for they are the officers of the parish, and not of the patron of the donative.

1 Barn. B. R. 5.
S. C.
Parish officers of
a donative are
subject to the
spiritual court.

Torrent vers. Burley. In Scaccario.

BILL to discover whether the defendant's husband died worth 40*l.* so as to be liable to pay the plaintiff a mortuary; and praying relief. Upon answer admitting assets, but denying the custom; the plaintiff went into a proof of his right, and several witnesses were examined on both sides. And at the hearing the bill was dismissed with costs as to the relief, because it was properly at law or in the spiritual court, and in a bill against one person only the right could not be established.

Cannot sue in
equity for a
mortuary.
2 Burn's Eccl.
Law. 506.

The

The dismissal was generally with costs, though the defendant had not demurred to the relief, but run into a proof of right. *Strange pro quer?*

Dominus Rex vers. Tenant.

After defendant is discharged at sessions a new order of bastardy cannot be made. L. Raym. 1423. 1 Sess. Ca. 272. pl. 213. S. C.

UPON an order of bastardy the defendant appealed to sessions, where upon a full hearing he was discharged afterwards the same justices make a new order upon him. And *Lee* moved to quash it, the defendant being by the former order of sessions absolutely discharged. 1 Vent. 59. Cro. Car. 352. 2 Bulst. 355. And of that of opinion was the court, and quashed the last order.

Dominus Rex vers. Reeks.

9 & 10 W. 3. c. 25. How to authenticate an admission that is not stamped at the time. L. Raym. 1445. 1 Barn. B. R. 8. S. C.

UPON a trial at bar on an information *in natura de* warranto for the office of burghers of *Christ-Church*, an admission of the defendant was produced, and it appeared to be a parchment that had only one stamp, and yet had five admissions entered upon it. And in order to make it good, they had annexed four other parchments, each of which was stamped. And the court held that would not make it good, and that the proper way would have been to have paid the four penalties, and had four new stamps on the first parchment, as was done in the bishop of *Chester's* case, ante 624. And for want of this there was a verdict against this and the other four defendants (1).

The next day they moved for a new trial (2). And the court would not hear any thing of the motion, unless they produced the admission, and shewed they had paid the penalty. And the defendants not caring to be at that certain expence for the uncertainty of gaining a new trial afterwards, they submitted to judgment of *ouster*.

1) But it seems according to the report in *Ld. Raym.* which is much fuller, that the admission of the first person named in the admission was good, and that the defendant was named third. *Vide* in *Gilbert v. Lackyer*, Dougl. 217.

S. P. And there is no mention either in that report or in *Barnard* of there being a verdict against any other person but *Reeks*.

(2) *Musgrave v. Nevins*, 584. *Smith v. Parkhurst*, post. 1167.

Gradell *vers.* Tyson.

DEBT upon a bond by the executor of the surviving executor of the obligee; and on error after a verdict Strangers objected, that it was not shewn, that the first executors proved will; and if not, this executor could maintain no action, it must be brought by the administrator *cum testamento annexo*. After a verdict, the court held it well enough, and affirmed the judgment.

Joistail.
1. Raym. 1441.
3. C.
An errore. C. B.
But a different point.

Griffin *vers.* Scott.

TRESPASS for entering his house, and keeping possession of his goods eight days. The defendant justified under a distress for rent; to which the plaintiff replies, a tender; on demurrer it was objected, that it ought to be pleaded with *uncore prius*. *Lutw.* 591. *Tho. Ent.* 265. *Winch.* 939. *Jac.* 423. *Salk.* 622. *Sed per curiam*, Be the replication good or bad, yet we must go back to the first fault, which is the plea, for the defendant ought to have removed the goods at five days end; and for the other three he is a trespasser, and there is no justification (1). *Judicium pro quer.*

The landlord must remove the goods at five days end, or he is a trespasser.
1. Raym. 1441.
1 Barnard. B. R.
3. S. C.

(1) See the report in *Ld. Raym.* the circumstantial and accurate, according to it the defendant should have removed the goods from the premises, not at the end of five days but in a reasonable time and impounded them in a legal pound, because the law, according to 11 Geo. 2. c. 19. *sect.* 10. does not allow the impounding of a distress on the premises, except in cases within 2 *W. & Sess.* 1. c. 5.

According to it also the defendant was held a trespasser, not after the three days, but *ab initio*, on the authority of *The Six Gentlemen's case*, 8 Co. 146. and *Wright v. Combes*, cor. *Ld.*

Macclesfield, C. J. et vide 3 Black. Com. 14. But by the 11 Geo. 2. c. 19. a distreiner may turn any part of the premises upon which the distress is taken into a pound, and he shall not be deemed a trespasser *ab initio* on account of any illegal act committed in making the distress. It is to be observed also that if this case had happened subsequent to this statute, still the defendant would have been a trespasser for two days at most, not for three, as the goods could not have been sold until the sixth day after they were taken. *Wallace v. King*, 1 H. Black. 13.

Dominus Rex *vers.* Pusey.

THE defendant colonel Pusey was indicted at the Old Bailey for perjury: and to avoid his appearing there, he moved, *certiorari*, and cited Sir Humphrey Mackworth's case, *Paf.* 10. *Sed per curiam*, That was not for forgery, but for affixing

No *certiorari* for a defendant to the Old Bailey.
1 Sess. Cal. p. 125. no. 246.
1 Barn. B. R.
1. S. C.

fixing the seal of the company in his custody without their authority, which was a contest of a civil nature: we must make a distinction of persons, and therefore cannot grant a *certiorari* for a defendant without consent of the prosecutor (1).

(1) *Rex v. Hes*, 1 Sess. Cas. 321. no. 234. S. P. *Vide Rex v. Wells*, ante 549.

Barry *vers.* Barry.

Practice.

Mich. 1 Geo. 2:

Ivery and Ma-

chen, the same

was held again.

L. Raym. 1452.

S. C.

THE principal died after the return of a *capias ad satisfaciendum* and before taking out a *scire facias* against the bail. And the court refused to stay proceedings against them, for strictness of law the bail are bound from the return of *non est inventus*; and it is but *ex gratia* that a surrender after is accepted which time they take at their peril. 1 Roll. Abr. 336. pl. 1. ante 511.

Murray *vers.* Thornhill.

Practice.

THE court refused to make a rule upon the *East-India* company to inspect their private books relating to the appointment of their servants (1).

(1) *Shelling v. Farmer*, ante 646. *Hodges v. Atkins*, 3 Wils. 398 and the note post. 1223.

[718]

Wild *vers.* Sands.

Cannot enter judgment on warrant of attorney after the attorney's death.

IT was moved to enter up judgment on an old warrant of attorney, the defendant being living, and the debt unpaid; but it appearing, the party to whom the warrant was to confessed was dead; the court would not grant the motion.

Astell *qui tam vers.* Andrews.

L. Raym. 1421.

S. C.

post. 1124.

Selling a single

gallon of wine

by an unlicensed

person in his

own house

which is drank

in another, is a

selling by retail

under 12 Car.

2. c. 25.

ACTION of debt upon the statute 12 Car. 2. c. 25. for selling wine by retail twenty several times without licence. The defendant pleaded *nil debet*. And upon the trial the jury found the defendant Not guilty as to nineteen of the twenty times, and as to one particular time they find a special verdict *viz.* That the defendant was a merchant and dealer in wine in *Bristol*, and that in his mansion-house there, he such a day sold one gallon of wine to one *Mills*, who carried it to the *Guildhall Inn in Bristol*, and that it was there drank; that this inn belonged

one 7. S. and that the defendant had no licence for the selling of wine; *et si, &c.*

The question in this case was, whether the selling of this one gallon of wine in the defendant's own house, which was spent in another, was a selling by retail within the meaning of the statute.

Serjeant *Chapple* for the plaintiff argued, that the selling one gallon is a selling by retail within the statute, for the statute describes what shall be accounted a selling by retail, *viz.* selling by pint, quart, bottle, or gallon, and though this was spent in another person's house, yet it makes no difference, for the words of the statute are general.

At common law every man had liberty to sell wine as he could, either by wholesale or retail, until the statute 7 E. 6. c. 5. which was the first restraining statute. And the next statute is the 2 Car. 2. upon which this action is brought, and this statute appoints commissioners to grant licences to sell wine by retail, and restrains more particularly than the former statute, for the words are, shall not be drank within mansion-house or without. *vide Hard. 338.*

Fazakerley contra argued, that this being a penal statute, ought not to be extended further than the express words would carry: the act was intended only to oblige persons residing in particular places, and who made a trade of selling by retail, to take licences, and not to subject a merchant to a penalty for one particular act: he cited 8 Co. 129, 130. where it is held, that a person may use a trade in a particular instance, notwithstanding the general restraint by the statute 5 Eliz. and to brew or bake for himself or family, is no offence within that act. And there being only one act found against the defendant, it was never the intention of the statute, to make such a person liable to the penalty.

[719]

This term the Chief Justice delivered the opinion of the court: and declared, that they were all agreed in it, that the plaintiff must have judgment; for the words of the statute are plain and express, and take in this very case; and it is not reasonable to allow a merchant to sell by retail without licence, any more than another person, for the words are general, *no person persons whatsoever.* And though the jury have found the defendant guilty of but one act, yet that is plainly within the statute, for the statute gives a distinct penalty for every particular offence. And therefore this single act of the defendant subjects him to such penalty. Judgment for the plaintiff.

Story *vers.* Atkins.

An *indebitatus assumpsit* in an inferior court may save the statute of limitations on a promissory note.

A declaration in an inferior court upon an *indebitatus assumpsit* and one upon a promissory note in a superior, may be averred to be for the same cause of action, although the sum claimed by the *assumpsit* exceeds the amount of the note.

A declaration that the defendant was indebted to the plaintiff in 20*l.* for different sums of money by the defendant to the plaintiff formerly lent, which in consideration thereof he promised to pay, may be good by custom; and the custom is sufficiently averred when the replication avers that *secundum consuetudinem civitatis præd'*, he there declared without setting forth the custom at large.

If the declaration had been ill, yet the plaint being regular it would have been sufficient to have prevented the statute of limitations (1). Promissory note may be given in evidence upon an *indebitatus assumpsit* (2).

ACTION upon the case upon several promises; and the plaintiff declares first upon a promissory note for 12*l.* 11*s.* second count upon an *indebitatus assumpsit* for 20*l.* money lent, and third for money laid out.

To the first count upon the promissory note, the defendant pleads, that the cause of action did not accrue *infra sex annos*, and to the other two counts he pleads *non assumpsit* generally, upon which issue is joined.

And as to the defendant's plea to the first count, the plaintiff replies, and admits that the cause of action as to the first count did not arise within six years before his exhibiting his bill in this court, but that it arose the 25th of March 1720. and that upon the 11th of February 1725. in order to recover the money due to him upon that promise, he levied his plaint in the sheriff of London's court, in *placito transgressionis super casum*; and avers that *secundum consuetudinem civitatis præd'*, he there declared against the defendant in an action upon the case, and sets forth his declaration; which was, *eo quod* the defendant such a day *indebitatus fuit quer'* in 20*l.* *pro diversis pecuniarum summis per præd' def. præfat' quer' prius debet*, which he promised to pay: then the plaintiff set forth that the defendant hereupon brought his writ of *habeas corpus*, by virtue of which the said plaint was removed into this court, and the plaintiff declared against him *de novo*; and avers it to be *pro eadem causa actionis pro qua levavit querelam suam præd' ut præfertur*: and then he avers, that the cause of action did accrue within six years before his levying the said plaint in the sheriff's court, and therefore prays judgment.

To this replication the defendant demurred, and shewed for cause, that it did not appear by the plaintiff's replication, that his bill against the defendant in this court was for the same cause of action, as that for which he levied his plaint in the court below. Upon which there was a joinder in demurrer.

And Mr. Reeve for the defendant took several exceptions to the replication.

(1) *Bewin v. Chapman*, 1 Sid. 228. S. P. *Matthews v. Phillips*, Salk. 434. *Mois v. Bruerton*, 1 Ld. Raym. 553.

(2) *Vide Randolph v. Reynolds*, P. Geo. 2 Bull. L. N. P. 136. 137.

1. That it ought to appear, either by the proceedings themselves, or by sufficient words of averment, that the cause of action is the same in both courts: and in this case, it does not appear by any means upon the face of the proceedings, that the cause of action is the same in both courts; for the declaration in the inferior court is upon an *indebitatus assumpsit*, and the declaration here is upon a promissory note, which are causes of action manifestly different: nor is there any sufficient averment in the replication, to shew the identity of the cause of action in the two courts, for the words are only these, *quod* (the plaintiff) *exhibuit billam suam pro eadem causa actionis præd' ut præfertur*, which is not issuable, neither is it confined to the matter of the first count, as it ought to have been, but goes generally to the plaintiff's whole declaration in this court.

2. The causes of action appear plainly to be different; because the declaration in this court being upon a promissory note, and the declaration in the court below upon an *indebitatus assumpsit*, for a different sum, they cannot be intended to be the same, for the promissory note could not be given in evidence upon the *indebitatus assumpsit*; and the two actions can never be intended to be the same, unless the same evidence will support both; and if they are different in their nature, no averment can reconcile them.

3. The plaintiff's declaration in the court below appears to be ill, for he has only declared by way of general *indebitatus assumpsit* for so much money *per præd' def. præfat. quer' prius debet*; which is ill, because it does not shew a consideration, or how the debt arose; which is what is always required, that the court may judge, whether it is a matter proper for such an action; and though this method of declaring may in some places be warranted by custom, yet in all such cases the custom ought to be set forth specially, and it is not sufficient to say *secundum consuetudinem* generally; as in *Raft. Ent. 550.* where *concessit solvere* is held to be well, by alleging the custom to declare in that manner, otherwise it would be ill.

[721]

Blencowe contra. There have been several exceptions taken to the replication, and the principal objection to it seems to be the first exception, That the plaint in the court below, and the action in this court, appear to be plainly different, and cannot be intended to be for one and the same cause. And I must agree that this objection will have great weight, if it can be supported by any thing that appears upon this record: but if the cause of action appears, or may be intended, to be the same in both courts, then your Lordship's judgment will be for the plaintiff.

Vol. II.

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The point therefore to be considered upon this exception, is the identity of the cause of action in the two courts. And though it is objected, that there is a plain and manifest variance both in the nature and cause of the two actions, because the plaintiff hath declared in the inferior court upon a general *indebitatus assumpsit* for 20 l. and in this court upon a promissory note for a different sum: yet I must beg leave to observe, that what is properly to be called the cause of action appears plainly in this case to be the same in both courts; for it is the defendant's breach of promise, which is the cause and foundation of both the actions: and though it is objected that the plaintiff hath declared for different sums in the two actions; yet that can have no effect upon the cause of action, for in both actions the *quantum* is to be ascertained by the jury: and in this case the damages which are demanded, are laid to be the same in both declarations, so that there is no foundation for that objection.

I admit that the declaration in this court is founded upon a statute, and the other is a declaration at common law: but unless there appears such a variance and inconsistency in these two actions, as necessarily obliges your Lordship to intend them to be for different causes, your Lordship will not presume them to be so; especially if the different methods of declaring in the two courts, can by any means be reconciled to one and the same cause of action.

[722]

At common law the party that was possessed of a promissory note, had no other remedy to recover upon it, but by declaring upon an *indebitatus assumpsit*, in which action he might give the note in evidence, but was obliged to prove the consideration. The statute 3 & 4 Ann. c. 9. gives the party the liberty of declaring upon the note itself; and since the making of that statute, the note hath been held to be sufficient evidence to maintain such action, without giving any further proof of the consideration: in this respect therefore these notes are altered by the statute, but in no other; for their *lien* is made no stronger than it was before; they are still only simple contracts, and the nature of their security is not changed, as was adjudged in the case of *Cumby v. Wane*, Pasch. 7 Geo. in B. R. where in an action upon the case for money lent, the defendant pleaded a promissory note given in satisfaction, and it was held to be no bar. And if this is all the alteration which the statute hath made in respect of those notes, how can it be supposed, that it hath taken from the party what was his former and ancient remedy of declaring upon an *indebitatus assumpsit*? The statute only gives him an additional and more easy method of recovering upon his note, but does take from him his election of pursuing his former method.

if he thinks it more proper for his case. And what proves this still more strongly, is the case of *Bromwich v. Lloyd, in Lutw.* 1585. where it is expressly held, that upon an *indebitatus assumpsit* a bill of exchange may be given in evidence; and by the same reason a promissory note may be given in evidence on the like declaration; for the statute 3rd 4th Ann. puts promissory notes upon the same footing as bills of exchange were before the making of that law. Therefore since the plaintiff might have given this note in evidence upon his declaration in the court below, it would be a strange conclusion to say that the two actions are different in their nature, or to intend the cause of them to be different, when the same evidence will support both the actions.

As there is nothing therefore inconsistent in the nature of the two actions, I beg leave to insist upon the averment, which the plaintiff makes in his replication, as a matter which puts the identity of the cause of action in the two courts, out of all manner of dispute; for the plaintiff hath expressly averred *quod exhibuit billam suam* in this court *pro eadem causa pro qua levavit querelam suam* in the court below,

And though it is objected by Mr. Reeve, which is his second exception, that this averment is uncertain, and that the defendant could not take issue upon it; yet I must submit it, whether there is any foundation for this exception; for the plaintiff having set forth how he levied his plaint, and how he proceeded upon it, could not make his averment in a more proper manner than he has here done: for he says, *quod superinde exhibuit billam suam præd'* in this court *pro eadem causa actionis pro qua levavit querelam suam præd' ut præfertur*; so that here is an express and positive averment, that his bill here and his plaint below, are for the same cause; and though the words *ut præfertur* refer it to the record, yet that cannot occasion any uncertainty, for there is nothing before set forth, but what agrees with this averment,

[723]

And though it is objected against this averment, that it is insufficient, because it is not confined to the first promise, upon which the demurrer now is; yet there can be no weight in this objection, for the averment is, that the plaintiff's bill in this court and his plaint below are for the same cause, which extends to all the counts in the declaration, and therefore necessarily covers the first promise: but if the record be rightly observed, there will appear to be no ground for this objection, for the replication begins with *quodam primam promissionem*, and then goes on and sets forth the proceedings in the inferior court, and confines the case to the first promise only.

The material part of the plaintiff's case is, that the two actions were *pro eadem causa*, and this is averred in such a manner, that if the defendant had rejoined, and said that the plaintiff's bill in this court was *pro alia et diversa causa, absque hoc* that it was *pro eadem causa*; there would then have been a plain and certain issue, confined singly to the identity of the cause of action, which is the very point upon which this case must turn.

And if the plaintiff hath made his averment in such a manner as is traversable, I must submit it, whether it doth not answer all the objections which are made against the identity of the cause of action; since the defendant by demurring has admitted it to be true: and to this purpose expressly is the case of *Sir Thomas Finch v. Lamb* in *Cro. Car.* 294, 295. 1 *Vent.* 252. where the point was, that in an action upon an *assumpsit* the defendant pleaded the statute of limitations, and the plaintiff replied and set forth an original brought within six years, which appeared to be laid in a different county and for different damages, upon which the defendant demurred, and insisted, that the new action varying in the county and damages, could not be intended to be for one and the same cause of action: but the plaintiff having averred that it was for one and the same cause of action, it was held, that this variance was not material, but was made good by the averment.

There hath been another exception taken to the form of the plaintiff's declaration in the court below, in the manner it is set forth in his replication; and the exception to it is, the third exception, that the plaintiff having only declared by way of general *indebitatus assumpsit* for so much money *per præd' defendantem præsto querenti prius debet*, it is said this is ill, because it does not shew a consideration, or how the debt arose. And I admit, that if this were a declaration originally in this court, this would be a good objection: but this declaration comes before the court only by way of recital, and the plaintiff hath expressly averred, *quod narravit secundum consuetudinem civitat' præd'*, and a custom to declare in this manner in an inferior court hath frequently been adjudged to be good. In 1 *Roll. Abr.* 564, 565. *concessit solvere* was held to be well in the court of *Bristol*. In *Stiles* 198. the same form was adjudged to be good, and *Rolle* Chief Justice said, there was the same custom used in the city of *London*, and that it was good. And in 4 *Leon.* 105. the same form was held to be good, though the plaintiff had only said *quod narravit secundum consuetudinem*, and had not any otherwise set forth in his declaration the custom of declaring in that manner, which comes up fully to the present objection, and shews that the custom need not be specially alleged,

But I must submit it in another light, whether the objections that are made upon the plaintiff's different form of declaring in the two courts, and upon his faulty manner of declaring in the court below (admitting it to be so) are not entirely foreign to the present question. For the point to be considered upon this demurrer is, whether the plaintiff's bill in this court, and his original plaint in the inferior court, appear to be for the same cause: the replication says only *quod levavit querelam suam pro eadem causa*, so that the declaration in the court below is quite out of the question; and therefore if the plaintiff's plaint in that court, and his action here agree the one with the other, it is all that is necessary; for the bare levying a plaint in an inferior court, is sufficient to prevent the statute of limitations, (1 Sid. 228.) and the demurrer is confined entirely to the variance between the *plaint* and the *action* here; and your Lordship will observe, that the *plaint below* and the *bill here* are exactly the same; for the plaint is *de placito transgr^s super casum ad damnum* of the plaintiff 20 l. which agrees with the words of the bill in this court; and though the plaintiff hath gone on and set forth the continuances of that plaint, and his declaration upon it, which is more than he need have done, yet I hope no fault which may now appear in that declaration, shall prejudice him so far, as to make the levying of his plaint stand for nothing, and so admit the statute to run against him and deprive him of his debt.

And I further submit it, whether the regularity of the plaintiff's declaring in the inferior court can properly be examined into upon this demurrer: for his declaration and proceedings there come before this court only by way of recital, and to shew that the plaintiff made a legal demand and pursued his right within a proper time: and though the plaintiff's declaration below should appear plainly to be erroneous, yet your Lordship will not now take notice of that, for that would be giving judgment upon a record which is not before you: and I beg leave to compare it to the case of *Williams v. Fowler*, Mich. 7 Geo. B. R. where in an action of debt brought against an administrator, he pleaded in bar, that his intestate was indebted to J. S. for goods sold and delivered, and that J. S. thereupon impleaded him and recovered judgment against him in an action of debt upon a *mutuatus*; to which the plaintiff demurred. And though it appeared by the defendant's own shewing, that the judgment was erroneous in the manner he had recited it, yet the court held the plea to be good; for till it was reversed in a proper manner, it was held to be a sufficient judgment to bar the plaintiff. *Ante* 407.

[725]

And as the intention of the statute of limitations was only to oblige persons to demand and prosecute their rights in some legal method

method within a reasonable time, I hope it appears clearly that the plaintiff hath strictly pursued the intention of that law, by making his demand in the inferior court in the manner he hath set forth, and that it appears as fully to have been for the same cause of action. And therefore I pray your Lordship's judgment for the plaintiff.

Raymond C. J. The actions in the two courts are of such a nature, that they may be averred to be the same; for the statute 3 & 4 Ann. only gives an additional remedy upon promissory notes, but does not take away the old one: and I think this note might have been given in evidence upon the *indebitatus assumpsit*, for the note imports the drawer's having so much money of the other's in his hands; and though it may not perhaps be allowed in evidence in such case as a promissory note, without further proof of the consideration; yet it may undoubtedly be given in evidence on an *indebitatus assumpsit*, as a paper or writing to prove the defendant's receipt of so much money from the plaintiff. *Hard's case, Salk. 23.*

And as the two actions may therefore be averred to be the same, so I take the averment to be sufficient and traversable; and the averment is confined only to the first promise, which is singled out by the word *quoad* in the replication, and closed as to the rest.

As to the objection that is made against the declaration in the inferior court, I think it of no weight; for though the declaration should be ill, yet if the plaint be regular it is sufficient to prevent the statute.

Reynolds and Probyn Justices, were of the same opinion; but

[726]

Fortescue J. held strongly, that the two actions were of so different a nature, that they could not be averred to be the same. He agreed, that the variance in the sums did not prevent the averment of their being for the same cause; but he held strongly, that since the statute a promissory note could not be given in evidence upon an *indebitatus assumpsit*; and cited the case put by *Hale, 1 Vent. 252.* which is this: *A.* in consideration that *B.* would marry his daughter, promised to pay 100 *l.* and in an action brought the plaintiff was barred; and in another action brought the promise was laid to pay the 100 *l.* at request, and it was held it could not be averred to be the same.

In the other points he agreed with the rest of the Judges; and said, that the form of declaring in the court below was well enough:

enough: that it had been so adjudged between *Stephens* and *Greenland* in this court, and that the case in 4 *Leon.* 105. was in point. Judgment for the plaintiff.

Higgins verf. Jennings.

TRESPASS *quare clausum fregit*, and for erecting a wall, and spoiling the grafs *pedibus ambulando*. The defendant pleads Not guilty as to all but the treading down the grafs, and as to that justifies for a way. The plaintiff replies *extra viam*, upon which they were at issue, and the jury find for the plaintiff upon both issues and 2*d.* damages. Upon motion the court ordered full costs, though there was no certificate, it appearing by the record that the freehold was in question (a). 2 *Lev.* 234 (1).

Where full costs though damages under 40*s.* L. Raym. 1444. S. C.

(a) Cit. Gilb. Ec. Rep. 198. S. C. 2 Snow. 28. but not S. P.

(1) *Beale v. Moore*, *post.* 1168. pleadings. *Cockerill v. Allanson*, S. P. But it is otherwise if the B. R. T. 22 Geo. 3. *Hullock on* extent and place where the way Costs. 86. Bull L. N. P. 330. lies has been agreed upon in the S. C.

Huggins verf. Durham et ux'.

ERROR of a judgment in C. B. in an action of debt brought by husband and wife against the warden of the Fleet for 464*l.* 6*s.* 2*d.* on the escape of *Oliver Read*, who was committed by the court of Chancery for that sum. And the declaration sets forth, that 5 February 6 Geo. there was a decree reciting the bill against *Read et al'* by the wife only, which suit abated by her marriage with the other plaintiff, who revived the suit, and *Read* put in his answer, insisting that he had repaid 200*l.* part of the money; and an issue being directed thereupon, the same was tried in a feigned issue, and found against him; that then the cause was heard upon the equity reserved, when it was referred to the master to take the account, who afterwards reported 464*l.* 6*s.* 2*d.* to be due, and appointed it to be paid to the husband, Then the plaintiffs set forth, that the report was confirmed, and *Read* prosecuted so far, as to be committed for non-payment, when the defendant suffered him to escape.

Where husband and wife may join in an action of escape.

[727]

After judgment by default in C. B. it was objected on error by Mr. *Strange*, that the wife ought not to have joined in this action, for by 5 *Ann. c. 9. § 4.* the action is given to such person to whom the money is to be paid by the decree; and this not being

5 *Ann. c. 9. § 4.*

an action maintainable at common law, they must take it as the statute has given it; and if the wife be joined where she ought not, it is error. 1 *Roll. Abr.* 782. And this is in the nature of a destruction of the first cause of action, and giving the husband a new one in his own right. 1 *Sid.* 299.

Sed per curiam, Though the order only appoints it to be paid to the husband, yet by the first decree it is directed that the master shall take an account what is due to the husband and wife, which shews she is interested in the case, and therefore proper to join in the action. Judgment affirmed.

Gregson vers. Heather.

4 Ann. c. 16.
Sheriff may
assign a bail
bond out of the
county, and the
action be brought
where the assign-
ment was.
L. Raym.

1455.
Fort. 366. S. C.
Trin. 13 Geo.
Norcroft and
Matthews,
the same point
ruled so again
on the authority
of this case.

DEBT upon a bail bond. And declares that he took out a writ directed to the sheriff of *Surrey, &c.* who took a bail bond, which he afterwards assigned to the plaintiff at *London*, where the action was brought. On demurrer it was objected, that the action was grounded on the bond entered into by the bail, and that being laid to be done in *Surrey*, the action should have been there.

Strange contra. The action is founded on the assignment which is the only thing that impowers the plaintiff to sue, and that is laid to be where the action is brought. 2 *Roll. Abr.* 602. pl. 9. Action for escape laid in *Nottinghamshire*, of one arrested by the sheriff of *York*. *Cro. El.* 625. 1 *Sid.* 218. the plaintiff has his election to bring his action for a false return, either in *Middlesex*, where the writ is returned, or in the county where the party was arrested. And if it should be thought that the executing the bond is part of the cause of action, yet 7 *Co. Bulwer's* case is express, that where matter in one county is dependant on matter in another county, the plaintiff may lay his action in either. *Et per curiam*, The law is certainly so, therefore judgment for the plaintiff.

[728]

Sutton vers. Bryan.

Practice.
Trin. 13 Geo.
Cobb and Kings-
mill, the same
rule.

THE court gave costs for not going on to execute a writ of inquiry according to notice; and said it was as reasonable, as in case of a trial (1).

(1) *Vide Shadford v. Houston, ante 317. S. P.*

Batson et al' *vers.* Sayer.

In Middlesex coram Raymond C. J. de B. R.

IN an action for a false return of a *mandamus* to swear the plaintiff into the office of churchwarden, the plaintiff set out, that he was elected, and presented himself to be sworn, but was refused; and *non fuit electus* returned.

There may be a select vestry, and what is laid only as a circumstance need not be proved.

The Chief Justice held, that by law there may be a select vestry, and that in this case the plaintiff need not prove the presenting himself to be sworn, because that is but a circumstance, and not to the point of truth or falsity of the return (1).

(1) So also in penal actions, *Combe v. Pitt*, 3 Burr. 1586.

Dominus Rex *vers.* Rhodes.

At the Old Bailey.

Indictment for forging a letter of attorney, whereby he transferred Mr. *Heysham's* stock, and Mr. Justice *Fortescue* refused to let *Heysham* be a witness (1).

Party whose name is to a deed, no witness to prove it a forgery.

(1) *Shank qui tam v. Payne*, v. Bunn, 4 Burr. 2251. Bull. L. 633. But see *Rex v. Brough* N. P. 288. and *Well's* case cor. post. 1229. *Abrahams qui tam* Willes C. J. Bull. L. N. P. 289.

Osborn against the Governors of Guy's Hospital.

At Guildhall coram Raymond C. J.

THE plaintiff brought a *quantum meruit pro opere et labore* in transacting Mr. *Guy's* stock affairs in the year 1720. It appeared he was no broker, but a friend; and it looked strongly, if he did not expect to be paid, but to be considered for it in will. And the Chief Justice directed the jury, that if that was the case, they could not find for the plaintiff, though nothing was given him by the will: for they should consider how it was understood by the parties at the time of doing the business, and a man who expects to be made amends by a legacy, cannot afterwards resort to his action.

Where a man does work in expectation of a legacy, he cannot sue the executor. Bull. L. N. P. 145.

Goodright ex demiss. *Lisle vers. Pullin et al.*

Devise to *A.* for life, and after to his heirs male of his body and his heirs for ever, and for want of such heir male, remainder over, is an estate tail in *A.* (1).

L. Raym. 1437.

1 *Barnard. B.*

R. 6. 2 *Eq. Abr.*

315. *S. C.*

Vide Fearn 4

ed. 282.

SPECIAL verdict in ejectment upon a devise by *Nicholas Lisle*, which was in this manner: "I *Nicholas Lisle* give and bequeath unto my wife all that my messuage or tenement called *Hattersfield*, to hold for the term of her natural life, and after her decease, then to my kinsman *Nicholas Lisle*, for and during the term of his natural life, and after his decease unto the heirs males of the body of the said *Nicholas* lawfully to be begotten and his heirs for ever: but in case the said *Nicholas* die without such heir male, then I give and bequeath the said premisses unto my kinsman *Edward Lisle* for and during his natural life, and after his decease to the heirs males of his body lawfully begotten and his heirs for ever; and for default of such heir male, remainder over." The jury find that upon the testator's death his widow entered and died seised, and that *Nicholas Lisle* (the devisee) and the widow, in her lifetime, suffered a common recovery, to the use of the said *Nicholas* in fee, and that the said *Nicholas* entered upon the death of the widow, and died seised, leaving no issue.

Edward Lisle the lessor of the plaintiff claims as heir male to *Edward Lisle* (the remainder-man in the will) supposing this to be only an estate for life to *Nicholas*, and therefore that the recovery suffered by him and *Mary* (the widow) could not bar the remainders. The defendant claims as heir in fee to *Nicholas*. The single question therefore is, whether *Nicholas* the devisee took an estate tail, or only an estate for life, by this will.

Boote, for the plaintiff argued, that it appear'd plainly to be the intention of the deviser, that *Nicholas* should take an estate for life only; for the premisses are expressly limited to him for life; and if the testator had intended him an estate tail, why there this restriction?

(1) Beside the present case superadded words of limitation have been held not to restrain the legal operation of a limitation to heirs or issue of the body in *Legate v. Scavell*, 1 *P. Wms.* 87. 1 *Eq. Abr.* 394. 2 *Vern.* 551. *Morris v. Le Gay*, cited 2 *Burr.* 1102. 2 *Aik.* 249. *Fearn C. R.* 4 ed. 247. *Morshull v. Minshull*, 1 *Aik.* 411. *Wright v. Pearson Fearn C.*

R. 4 ed. 187. *Ambl.* 358, *S. C.* *King v. Burchell*, 4 *Term Rep.* 296. *Amb.* 379. *Roe v. Green* 2 *Wils.* 322. *Denn v. Puckey*, *Term Rep.* 299. and see *Dumdem. Blandford v. Applin*, 4 *Term Rep.* 82. As to the cases in which they have been controlled by subsequent words, *vide Stannard v. Weigh post.* 804. *Lew v. Daw* *post.* 849.

The son of *Nicholas*, if he had had one, could not have taken away of present and immediate devise, but as a purchaser after the decease of his father, because the limitation is to his heirs males, after his decease, and not till then; and a devise to *A.* for remainder to the sons of his body lawfully begotten, is only an estate for life, 1 Roll. Abr. 837. pl. 13. In *Wild's* case, 6 Mod. 17. a devise to one and after his decease to his children, is only an estate for life, and the children must take by way of remainder: which case agrees with the present, for here it is a devise to *Nicholas* for life, and after his decease to his heirs males.

But the subsequent words in this will, will make the case much stronger, which are these; *In case the said Nicholas die without such heir male*; for the words *such heir male* in the singular number, are relative, and qualify the foregoing words *heirs males of his body*, by pointing out and describing the very person that is to inherit, so as to make him a mere purchaser. And in *Archer's* case, 1 Co. 266. comes up fully to this case, and is founded on the same reason: and the only difference in the two cases is, that in *Archer's* case the limitation was to the next heir male, and in the present case the devise is to *his heir male*, and the word *next* is omitted: yet the words *his heir male* are as plain a description of the person, as the words *next heir*, and therefore cannot be taken to be words of limitation, any more than in *Archer's* case.

[730]

Fazakerley contra. The intention of the testator is an uncertain rule for the construction of wills, which must be considered by the rules of law. Cro. Eliz. 525.

The words *heirs males* are words of limitation even in a deed, Co. 104. *Shelley's* case.

By the devise in the present will there is an estate tail executed to *Nicholas*; and tho' it is objected, that the limitation being to him for life expressly, will alter the case; yet there is nothing in that objection, as was adjudged in the case of *King v. Melton*, 1 Vent. 225. and 2 Lev. 58. where the devise was to his son *Bernard* for life, and after his decease to the issue of his body lawfully begotten on his second wife; and yet it was held to be an estate tail in *Bernard*; which is a stronger case than the present, and fully answers the objection of the express limitation to *Nicholas* for life only.

It is objected, that the word *his* must controul the precedent words *heirs males*, and relate to them; but it is not necessary that it

it should relate to *heirs males*, for it may be satisfied by a better construction, by referring it to the word *Nicholas*, which is in the singular number. It was certainly the intent of the testator, that all the heirs of *Nicholas* should take; but by construing the word *his* to relate to *heir male*, the estate would vest by way of *designatio persona* in the eldest son only, for he only is the heir male, and all the other sons would be excluded.

[731]

Ab. Cas. Eq.
284.

The words *heir male* are *nomen collectivum*, and include all the *heirs male*, as the word *issue* does, and *ex vi termini* takes in the whole generation; so that under that description all the sons may take, and it is not confined to one. In the case of *Backhouse v. Wells*, in Lord *Parker's* time, a devise was to *A. for life only*, and after his decease to his issue; and this was held to be an estate for life in *A.* because of the words *for life only*, and the limitation after being to his *issue*, which is a word of purchase. But Lord *Parker* took a distinction, that if the words had been *heirs male* instead of *issue*, the operation of the law would have been too strong for the intention of the testator.

In the present case there is an express estate tail devised, and no special words to controul or alter it, and therefore it ought to be so adjudged, as in the case of *Atkins v. Atkins*, *Cro. Eliz.* 248. and if any words are to be rejected, it is most rational to reject the latter.

Raymond Chief Justice, It will be a difficult thing to make this an estate for life: and the case of *King v. Melling* answers all the objections, as to the limitation to *Nicholas* for life.

The word *issue* is a proper word of purchase, but the word *heirs* is always a word of limitation (2), and the word *heirs* being used in this case, the words *after his decease*, are of no force.

The words *heir* and *heir male* are *nomina collectiva*, and include all the heirs of the devisee: and in *Archer's* case it was the word *next* which confined it to one particular person, for without that word, it would have been a limitation, and not a purchase.

(2) *Vide ante* 31. But the words, "*heirs of the body*" have been considered as words of purchase where the intent required it in a covenant to stand seised to uses. *Lisle v. Gray*, 2 *Lev.* 223. *Raym.* 278. as also in a deed of trust. *Allgood v. Withers*, cited in *Burr.* 1107. *Et vide* the opinion of *Hardwicke* Lord C. in *Bagshaw v. Spencer*, 2 *Atk.* 580. 1744. 147.

The word *his* is the word which makes the difficulty in this case; but I think that it may very properly be referred to *Nicholas* himself. Suppose *Nicholas* had had several sons; if the eldest had been made a purchaser by this will, the other sons could not have taken; and there must be stronger words than these to controul the words *heirs males* and make them words of purchase. I therefore think this clearly to be an estate tail in *Nicholas*.

Fortescue Justice, I am clearly of the same opinion: and think the case of *King v. Melling* to be a much stronger case; because of the power there given to make a jointure. The word *heirs* is certainly a word of limitation, unless there are other words which confine it to a particular person, as the words, *next, eldest, &c.* and without such words added to it, it can never be a word of purchase: but it hath been held that the word *issue* may be construed either way.

The word *heir* refers to *Nicholas*, and the word *such* means such heir male in succession.

[732]

In *Archer's* case the particular person was pointed out by the word *next*; and in *Wild's* case there is the word *children*, which could not be a word of limitation, and he cited *Moor* 124.

Reynolds and *Probyn* Justices, of the same opinion, and judgment was given for the defendant by the whole court.

Earle *vers.* Hinton. In C. B.

A *Scire facias*, was brought against the defendant as executrix of her late husband deceased, upon a judgment obtained against her as executrix. To which she pleaded in bar, a judgment obtained against her testator for so much money, and that she had not assets *ultra, &c.* To this the plaintiff demurred.

Executor cannot plead judgments to the *scire facias* which he might have pleaded in the action (1).

Raby Serjeant for the plaintiff insisted, that the defendant might have pleaded the judgment against the testator in bar to the

(1) *Trail v. Edwards*, 6 Mod. 108. *Skelton v. Hawling*, 1 Wils. 58. *Wharton v. Richardson*, post. 175. *Ramsden v. Jackson*, 1 Atk. 92. *Erving v. Peters*, 3 Term Rep. 685. Bull. L. N. P. 122. And according to the two last cases it is

immaterial whether the original judgment against the executor was by confession or default, or whether there had been a verdict against him he having neglected to plead *plene administravit*

action brought against the defendant as executrix, and she being neglected to do that, shall not be at liberty to plead it now the *scire facias*; for her suffering judgment to go against her executrix is an admission of assets. 3 *Leo*, 113, 114. & 310 (a).

(a) L. Raym.
587. Com. 87
3 Term Rep.
690. S. C.

Eyre Chief Justice, It is a settled rule in law, that if a defendant has a matter proper for his defence, and he neglects to plead it in bar to the action at the time he may, he shall not take advantage of it after (2). If an executor hath 100 l. assets, and there are two creditors each for 100 l. and both sue him for that sum; the executor hath no way but to suffer judgment in one, and plead it in bar to the other (3). And if he suffers judgment in both actions, he cannot plead the judgment of one against the *scire facias* of the other, but must pay both debts. If a tenant in tail upon a *scire facias* be returned tenant in fee, and suffers judgment by default; upon an *elegit*, and ejectment brought, he cannot give in evidence, or any ways defend himself by his tenancy in tail, because he might have pleaded it in bar to the *scire facias*. 2 *Sid*. 12. 1 *Sid*. 54. *Hob*. 21. Judgment for the plaintiff.

(2) *Vide post*. 1043.

(3) *Anon. Show*. 202. *Watson v. Ogden*, *Doug*. 452. S. P. where the debts were in the same degree. But a plea by an administrator of judgment confessed on a single

contract debt to an action on bond must aver that he had notice of the specialty creditor's demand. *Sawyer v. Man*. 1 *Term Rep*. 690.

Burrows *vers.* Jemino. In Cane'.

[733]

A man cannot be sued here on his acceptance of a bill of exchange abroad after he has been discharged by the laws of that country. *Mosely*, 1 *Sel. Cas. in Chan*. 169. 2 *Eq. Ab*. 524. c. 7. S. C. 12 *Vin Abr*. 474. 2. 524. pl. 7. *Sel. Chan. Cas*. 69. S. C. *Theo. Evid*. 39. *Trin. at Nil. Pl.* 231. 3 *Keb*. 785. pl. 34. *Comb*. 20. 3 *Mod*. 194. n. to 2d. ed.

A Bill of exchange was drawn upon the plaintiff at *Legh* which he accepted: but by the law there, if a bill be accepted and the drawer fails, and the acceptor hath not sufficient effects of the drawer in his hands at the time of the acceptance the acceptance becomes void (1). And this happening to

(1) In *Mosely's Rep.* the custom is stated to be, "that if the drawer has failed before the acceptance of the bill, and the acceptor at that time has no notice thereof, he shall not be obliged

to pay the bill unless he has sufficient effects of the drawer's in his hands at the time of the acceptance, and then he shall be only answerable for their value." But *Ab*. 524. represents the custom to be as it is stated here.

the plaintiff's case, in order to discharge himself of this acceptance, he instituted a suit at *Leghorn*, and his acceptance was thereupon vacated by a sentence in that court. Afterwards the plaintiff returned to *England*, and was sued here at law upon this bill; and thereupon he exhibited his bill in this court for an injunction and relief.

King Lord Chancellor was clearly of opinion, that this cause was to be determined according to the local laws of the place where the bill was negotiated: and the plaintiff's acceptance of the bill having been vacated, and declared void, by a competent jurisdiction; he thought that sentence was conclusive, and bound the court of Chancery here: and to this purpose he instanced the case of one *Hutchinson*, which was in 29 *Car. 2.* and is mentioned in *Show. 6.* where *Hutchinson* having killed a person in *Spain*, was there prosecuted, tried and acquitted of the murder; and afterwards returning to *England*, he was indicted again for the same murder here, to which indictment he pleaded the acquittal in *Spain* in bar, and the plea was allowed to be a good bar to any proceedings here (2).

And upon the Attorney General's insisting, that the plaintiff might have taken advantage of this matter upon a trial at law, and therefore not relievable in a court of equity:

The Chancellor declared, That if he was to try the cause at law, he would allow the plaintiff the benefit of this matter upon the trial. But as other Judges might be of a different opinion, he would not put the plaintiff upon the difficulty and hazard of a trial. And he said he remembered a case which came before him in the Lord Mayor's court, when he was recorder of *London*: where a mariner sued in the admiralty court for his wages, and there being a sentence against him there, he afterwards brought his action in the Mayor's court for the same wages; and his Lordship (as recorder) being doubtful whether he should allow the defendant to give the sentence in the admiralty court in evidence upon *non assumpsit*, asked the opinion of Chief Justice Holt, who said, That whatever defeated the promise, might be

B. L. N. P. 151,
152.

(2) *Vide Blunt v. Bampfild*,
Chanc. Ca. 237. Newland v.
Weseman, 1 Vern. 21. 2 Chanc.
74. Ex parte Burton, 1 Atk.
55. But where the sentence is
peremptory, an appeal from
to an higher court remaining

undecided, and the party is willing to forego his suit there, Chancery will not grant an injunction to prevent his suing at law here. *1 Vern. 21. 2 Chanc. Ca. 74.*

given

given in evidence on *non assumpsit*, and that the sentence in the admiralty court would be good evidence.

And in this case a perpetual injunction was granted, to enjoin the defendant from suing upon this bill. *In Canc.* 22d of November 1726.

Dawkins *vers.* Burridge.

12 & 13 W. 3.

c. 3.

Members of
Parliament may
be sued in C. B.
by bill.

L. Raym. 1442.

1 Barn. B. R.

7. S. C.

AN action was brought in the Common Pleas *by bill* against the defendant, who was set forth in the plaintiff's declaration to be a member of Parliament in this manner, (*viz.*) *contra def' habente privileg' parliamenti*; the plaintiff had judgment by default, and the defendant now brought a writ of error.

And Mr. *Reeve* for the plaintiff in error took this exception to it: that the act 12 & 13 W. 3. c. 3. gives no power to the court of Common Pleas to proceed in such cases *by bill*. The words of the statute are, "That members of the House of Commons may be proceeded against in his Majesty's courts of King's Bench, Common Pleas, and *Exchequer*, by summons and distress infinite, or by original *bill*, and summons, attachment and distress." And he insisted, that the word *bill* which is mentioned in the statute, is not to be applied to the court of C. B. but only to this court; for a *bill*, being the proper and usual process of this court, and an *original* the proper process of C. B. the statute did not intend to alter the process of the two courts, and to confound them; but to apply to each court its proper process, and leave it in that respect, as it was before.

But upon considering the words of the statute, the court was all of opinion, that the plaintiff might proceed against the defendant in the court of Common Pleas *by bill*, notwithstanding it was not the usual process of that court: for the court observed that there was a proviso in the statute, "That it should not extend to give any jurisdiction to any court to hold pleas in any real or mixt action, in any other manner than such courts might have done before the making of this statute; which they said implied, that in personal actions, such as the present was, the plaintiff might, by virtue of the first clause of the statute, proceed either *by bill* or *original*." Judgment affirmed.

Crokatt *vers.* Jones.

ACTION upon the case upon a bill of exchange. The defendant pleaded, that the bill was first exhibited 23 October 12 Geo. *quodque non assumpsit infra sex annos ante exhibitionem bille.* To which the plaintiff replied, that the action was first commenced 28 November 11 Geo. and that the defendant promised within six years before that: the defendant demurred. And Serjeant Chapple *pro def.* insisted, that it was not enough to say the action was first commenced such a day, without shewing the process, and continuing it down to the time of the declaration; and so is *Salk.* 420.

Amendment by adding continuances.
L. Raym. 1441.

[735]

Strange contra cited *Tho. Ent.* 438. which is in the same form as this. But the court would not allow that as a sufficient authority, and *Lutw.* 256. was cited as a case in point. Whereupon it was adjourned: and at another day I moved to amend the replication, by setting out the *latitat*, and adding the continuances; and cited *Winkworth v. Clarke* (a), where they were sent up for after a writ of error, it appearing there (as it did in this case) that there were regular continuances, *P. 4 Geo.* and as to its being after a demurrer, I cited *Russel v. Martin and Thorpe*, ante 583.

(a) See this case at large in 10 Vin. Abr. 39, pl. 47. & 1 Will. 303—4. Ante 139. Post. 1227.

Serjeant Chapple *contra*, cited *Hales v. Hales* in *C. B. Pas.* 1 Geo. where they refused to let the plaintiff add continuances after a demurrer. *Sed per curiam*, The authorities of our own court warrant it, and therefore let the replication be amended, in payment of costs.

And afterwards the pleadings being closed, it appeared that the plaintiff declared upon two bills of exchange and several other promises; the defendant as to the two first counts upon the bills of exchange pleads *quod actio non accrevit infra sex annos*, and as to the other counts *non assumpsit* generally. The plaintiff replies that upon such a day he sued out a *latitat*, which he continues down to the present declaration, and avers that the cause of action arose within six years before the suing out the *latitat*. The defendant rejoins: *protestando* that there was no such writ sued as set out by the plaintiff, for plea says, that after the six years were expired, (*viz.*) such a day, the plaintiff first sued out *latitat*, which he sets forth, and that he appeared to it, and that the plaintiff declared upon it as above; and traverses that he appeared and put in bail to the writ mentioned in the replication; *et hoc paratus est verificare.* The plaintiff demurred, and shewed for cause, that this rejoinder is contrary to the record of

There can be no issue offered that is contrary to the record.

the appearance, and is a negative pregnant. The defendant joined in demurrer.

[736]

Strange for the plaintiff argued that the rejoinder was contrary to the record; and this is not a denial of there being such a record, but an offer to put in issue the effect of it. And the plaintiff could not take issue and carry it to a jury, to inquire which writ the appearance related to. The only issue the defendant could have taken was, whether the cause of action accrued within six years before the *teste* of the first *latitat*.

Here is first a *protestando* that there is no such writ, and then the traverse admits it, and offers to try whether the defendant's appearance was upon that or another.

Second objection. If this were a matter issuable, yet there being a negative and an affirmative, the rejoinder is ill in the manner it is, for it ought to have concluded to the country.

Serjeant *Chapple* for the defendant, did not offer to support the rejoinder, but insisted that the replication was ill; for the plaintiff should have averred, that he actually sued out and prosecuted such writ to avoid the statute; but here he only says that the court awarded such a writ, and then sets forth the continuance upon it, which is not sufficient. *Thom. Ent.* 151. *Brown Red.* 104. *Salk.* 420.

The plaintiff should likewise have shewn, that a bill of *Middlesex* was taken out precedent to the *latitat*, for that is the foundation of a *latitat*, and ought always to issue first.

The court were of opinion that the rejoinder was ill, and that the writ and continuances were sufficiently set forth.

A *latitat* prevents the statute of Limitations without a bill of *Middlesex*.

Raymond C. J. at first doubted whether the plaintiff ought to have shewn that a bill of *Middlesex* issued before the *latitat* because the bill is the foundation of the *latitat*. But afterwards he agreed with the rest of the court, that it was not necessary. *Stiles* 156. 1 *Sid.* 53. 60. (1) And judgment was given for the plaintiff.

(1) *Hollister v. Comer*, ante 550. S. P. *Bull. L. N. P.* 151.

Hilary Term

13 Georgii Regis. In B. R.

Sir Robert Raymond, Knt. Lord Chief Justice.

Sir John Fortescue Aland, Knt.

James Reynolds Esq.

Sir Edmund Probyn, Knt.

} *Justices.*

Sir Philip Yorke, Knt. Attorney General.

Charles Talbot, Esq. Solicitor General.

Dudley vers. Nettlefold.

UPON a reference it was awarded, that the plaintiff should pay the costs; and there being no body appointed to tax them, the court supplied it by ordering the Master to do it (1). *Strange pro def.*

Award supplied by rule.

(1) *Vide Wall v. Fulwood, Com. lam. ib. 166. Perry v. Nicholson, Rep. 331. Stephenson v. Brown. Say. Rep. 240. Bag, Barnes 56. Furnis v. Hal-*

White vers. Holland et al.

UPON debate it was held, that the rule for payment of 5*l.* for not filing common bail according to the 9 & 10 W. 3. c. 25. § 33. should be made absolute on the first motion, the words of the statute being, that the court shall immediately award judgment, whereon the plaintiff may take out execution. *Strange pro quer.*

Practice as to the 5*l.* for not filing common bail. *Gillb. K. B. 369. 1 Tidd's Prae. 122. note (g).*

Stiles against Serjeant Mead.

Plea of privilege
without affidavit
set aside.

HE pleaded his privilege as a Serjeant, with a writ annexed, But for want of an affidavit that he had business there, and there only, the court set it aside.

Brownsmith *vers.* Gilborne. In Cane.

No carrying a
voluntary set-
tlement into ex-
ecution.

THE defendant had two daughters, and on the marriage of one of them to the plaintiff's brother, the defendant entered into no agreement to give her any portion; but only told him, that as she had only that and one daughter more, the estate would come between them.

Seven years after the marriage the two daughters with the mother's consent cast lots for the estate and an attorney was directed to prepare a settlement of what should fall to each daughter, to be settled after the death of the mother, as to this plaintiff's sister-in-law, upon her and her husband for life, with remainder to his right heirs. The attorney through carelessness omits to complete the settlement, either in the life of the wife or the husband; and now the plaintiff as heir at law to his brother brings his bill to have the settlement completed, insisting that the marriage being had in prospect of the estate, this was not barely a voluntary agreement, but was to be taken as in consideration of marriage.

But King Lord Chancellor dismissed the bill with costs; saying it was merely voluntary, there being nothing in writing at the time of the marriage, so as to be an obligation within the statute of Frauds: at the time of casting lots the mother was under no contract to do it, it was a voluntary act: and there could be no case shewn, where a court of equity ever decreed the specific execution of such an agreement (1). *Strange pro quer'.*

(1) *Vide Coleman v. Sarrel, 3 Bro. Chanc. Cas. 12.*

Radley *vers.* Rudge.

A piece of tape,
well in trover.
(i)
1 Barn. B.R. 9.
S.C.

UPON motion in arrest of judgment, it was held well enough in trover to declare for a piece of tape, without saying how many yards it contained.

(1) *Thornton v. Barnard, 2 Ld. Raym. 991. et vide post. 809.*

Dominus Rex *vers.* Seaward.

INFORMATION against the defendant for challenging a person to fight. The defendant pleaded in abatement, that he was a surgeon, and not a Gentleman, as he was stiled in the information; and upon debate, the court gave leave to amend the information, upon payment of costs (1).

Information amended after plea in abatement.
L. Raym. 1472.
Pasch. 9 Ann.
Regina v. Burg de Malmesbury, mistake of the name of corporation amended after plea in abatement.

(1) *Dub. Regina v. Stedman, Tutchin, Rex v. Johnson*, cit. 2
2 *Ld. Raym. 1307. Rex v. Ld. Raym. 1472. S. P.*

Chefman *ex ux'* *vers.* Nainby.

ERROR of a judgment in *C. B.* in an action of debt upon a bond entered into by the wife *dum sola*: the defendants crave *oyer* of the condition, which is set forth in *hec verba*:
“Whereas the above-named *Margery Nainby*, at the special instance and request of the above-bound *Elizabeth Vicars*, is to take her the said *Elizabeth Vicars* for her hired servant, to attend in her shop, and to inspect her customers there, and to shew her goods, and further to stand by and assist her the said *Margery* in her said trade and business of a linen-draper, whereby it is presumed the said *Elizabeth*, if she continues any length of time in the said service of the said *Margery*, may become a perfect and knowing person in the said trade and mystery: and whereas the said *Margery Nainby* consents to hire and take the said *Elizabeth Vicars* upon and in consideration only upon the express promise and agreement of the said *Elizabeth*, that she the said *Elizabeth* shall not nor will at any time after she shall have left the service of her the said *Margery* set up or exercise the trade or mystery of a linen-draper, either by herself or by any other person or persons in trust for her use, either directly or indirectly, in any shop, room or place within the space of half a mile of the said now dwelling house of the said *Margery Nainby*, situate in *Drury-lane*, or any other house that she the said *Margery Nainby*, her executors or administrators shall think proper to remove to, in order to carry on the said trade of a linen-draper; nor shall she the said *Elizabeth* within the same space of half a mile, directly or indirectly, be concerned in or assist or instruct any other person or persons in the managing and carrying on the said trade, under colour or pretence of being a servant to such person or persons, or under any other colour or pretence whatsoever: which said express promise and engagement,

A bond to C. conditioned, in consideration of her teaching B. a trade, that B. after leaving her shall not, either by herself or any other person for her use, carry on the trade or instruct any person to carry it on within half a mile of B's now dwelling house; or of any other house she, her executors or administrators shall remove to, is good where the breach is assigned for instructing B's husband in that trade within half a mile of A's then house.
L. Raym. 1456.
Fort. 2 7.
3 Bro. Par. Ca. 349.
Viner vol. 5. p. 96. note to ca. 25.
Vol. 20. p. 327.
S. C.

" joined with the good character and opinion that she the said
 " Margery hath in the integrity and honesty of her the said *Eliza-*
 " beth, is the sole consideration and inducement that has obliged
 " the said Margery to take the said *Elizabeth* into her service for
 " the space of three years. Now the condition of the above obli-
 " gation is such, that if the said *Elizabeth Vicars* shall act con-
 " trary to and in breach of the above recited promise and agree-
 " ment, according to the true intent and meaning thereof, or
 " of any part thereof; that then and in such case, the said *Eliz-*
 " *abeth Vicars*, her executors or administrators, shall thereupon
 " pay or cause to be paid unto the said Margery Nainby, her
 " executors, administrators, or assigns, the full and just sum of
 " one hundred pounds of good and lawful money of Great Bri-
 " tain, without fraud or further delay, the said sum of one
 " hundred pounds being the consideration money which it is
 " computed the said Margery Nainby might reasonably expect
 " with an apprentice to the said trade; that then this obligation
 " to be void, otherwise to be and remain in full force and virtue
 " in law." *Quibus lectis* they plead that the defendant *Eliza-*
beth entered into the service, and continued from the time of the
 bond to 28 April 1724, that the plaintiff continued to live in
Drury-lane to the bringing the action, and exercised her trade
 there, and that the defendant did not set up the trade, or in-
 struct any body, within the bounds mentioned in the condition.
 To this the plaintiff replies, that the defendant *Elizabeth* took
 the other defendant to husband, and did within half a mile of
 the plaintiff's house in *Drury-lane*, instruct her husband in the
 trade upon which they are at issue, and it is found for the
 plaintiff, and on a writ of error in *B. R.* the general errors are
 assigned.

Strange pro quer' in errore, argued, that this is a void bond,
 and consequently the judgment given upon it for the plaintiff is
 erroneous, and ought to be reversed. I take the law to be so
 fully settled upon this head of contracts in restraint of trade by
 the case of *Mitchel v. Reynolds* (which was in this court, *Hil.*
 11 *Ann.*) that I shall not attempt to dispute the authority of that
 case, or to revive the distinction which before was given into
 between a bond and a promise; but taking the law to be, as it
 was settled by the several distinctions made use of in the judgment
 of the court in that case, I shall only endeavour to shew, that
 the case at bar is widely different from the case of *Mitchel v.*
Reynolds, and does not fall within the reasoning upon which the
 bond in that case was supported.

In order to do this it will be necessary, to recite what the con-
 dition of the bond was in that case. It recited that the defend-
 ant

1 P. Will. 181.
 30 Mod. 27.
 85. 130.
 Fort. 296. S. C.

it had assigned to the plaintiff a lease for five years of a bakehouse in *Liquorpond-street* in the parish of *St. Andrew, Holborn*; therefore the defendant did not exercise the trade of a baker in that parish during the said five years, the bond was to be void. And it was resolved by the court on solemn argument, that in cases of restraint of trade, where nothing more appears, the law presumes it to be bad: and that in order to make it good, must appear to be confined to a particular place, and upon a consideration moving from the obligee to the obligor. And that all general restraints are void, whether by bond, covenant or promise, and though with a consideration; and so are also all particular restraints where there is no consideration: (and to support this were cited 2 *Cro.* 596. 2 *Bulst.* 136. *Allen* 67. *Bro. Eliz.* 872.) So that taking this case for law, in order to support this bond, it must be shewn, that it is upon a good consideration, and that the restraint is confined to a particular place.

But I hope to satisfy your Lordship, that here does not appear to be any consideration to induce the obligor to part with his natural liberty: or if there should be a consideration, that yet the restraint is general, and consequently that the bond is void upon that account.

As to the consideration, your Lordship will observe, that in the case of *Mitchell v. Reynolds* it appeared there was an actual assignment of the lease before made: whereas here the consideration is *in fieri*, the bond only says that the plaintiff is to take the defendant into her service: here is nothing whereby the defendant can compel the plaintiff to do it; so that upon the foot of this agreement the defendant is laid under a restraint, though she is never received into the service of the plaintiff, or gains any instruction in the trade, which is to be the consideration for laying herself under this restraint.

Every consideration is either executed, or executory. In *Car.* 139. it is defined to be a meritorious cause, requiring a mutual recompence in fact or in law. Upon the face of the bond it appears not to be a consideration executed; and that which I cannot compel the performance of, can never be esteemed an executory consideration. Unless I can compel the party to perform the act, it is as no consideration in the eye of the law, which will never suffer me to part with so valuable a privilege, and at the same time stand to the courtesy of another, whether I shall have any thing for it or not; there ought at least to have been a mutual covenant. But it will be objected, that this want of a consideration executed upon the face of the bond is cured by

by the plea, which shews that the defendant did afterwards enter into the service of the plaintiff, and continued there for some time. I admit the plea to be so, but that is not enough. This case must be taken as it stood at the time of executing the bond, and is not to be made better or worse by matter *ex post facto*. Your Lordship must determine upon the face of the bond, whether it be good in point of law or not; and as the defendant could not be received to aver against a consideration if it had been recited, so neither can the plaintiff be received to support her bond by any thing that does not appear in the instrument itself. Nay, if the plaintiff was to pray in aid of our plea, yet upon that it does not appear the whole consideration is performed; for by the condition the plaintiff was to instruct her for three years, and if it is taken upon the plea, it appears she was not there so long. In *Yelv.* 49, it is held, that where the consideration is *in fieri*, a strict performance must be shewn.

But whatever should be your Lordship's opinion upon this part of the case, with regard to the want of a consideration; yet I apprehend the bond will be void upon another account, as being a general restraint. The first part of the restraint is indeed only particular: the defendant is particularly restrained from setting up the trade within half a mile of the dwelling house of the plaintiff in *Drury-lane*. So far it may be good: but then it is added, *or any other house that she the said Margery Nainby, her executors or administrators, shall think proper to remove to*; this makes it a general restraint, because it puts it in the power of the plaintiff, to prevent the defendant from exercising the trade in any part of the kingdom.

The reason why particular restraints are allowed is, because the publick is not concerned, so long as the party exercises the trade somewhere. But if it tends to prevent the exercise of it any where, it is not to be endured; because the publick loses the benefit of the party's labour, and the party himself is rendered an useless member of the community. I beg leave to put the case, that the defendant in order to comply with this bond should take a house and settle herself at a mile's distance from the plaintiff, and get into business there; would it not be exceedingly hard, that the plaintiff should have it in her power, maliciously to deprive her of this, by removing it into her neighbourhood, or even by making a person in that neighbourhood her executor; for so the bond is, that she shall not exercise the trade within half a mile of the habitation of the executor or administrator. Nay, the bond may be forfeited notwithstanding all the caution in the world on the defendant's side, for the plain-

it may come and live in that neighbourhood before the defendant has notice, or any time to remove.

Another difference between this case and that of *Mitchell v. Reynolds* is, that that was confined to the setting up the trade as master, but the defendant here is restrained even from getting her livelihood as a servant. In one the restraint was for five years only, in the other it is indefinite. Suppose the defendant should after leaving the plaintiff's service, be bound out as an apprentice to a linen draper in the plaintiff's neighbourhood (as she may against her consent) is it reasonable, that the act of the justices, which she cannot prevent, should make her liable to the penalty of this bond?

In the case of *Mitchell v. Reynolds*, it was urged for one reason against the allowance of a general restraint, that it was to fix a disadvantage on one side, without a benefit to the other; for though it may be for my benefit, that one of the same trade should not come and set up by me; yet it can be of no advantage to one in *London*, to restrain another from exercising the same trade in *York*. Now this restraint is to operate even after it ceases to be any benefit to the plaintiff, for the defendant cannot exercise the trade in *Drury-lane* though the plaintiff should die or leave it off; for the words about carrying on the trade are confined to any other house she shall remove to in order to carry on the trade: but as to the house in *Drury-lane* the restraint is to take place whether the plaintiff uses the trade or not, or even though she should not so much as live in that place.

I shall add but a word more, and that is as to the replication and verdict. The replication is, that she instructed her husband within half a mile of the plaintiff's house in *Drury-lane*, and so is the verdict: but it does not say he carried on the trade within half a mile. The man might live many miles off, and yet the wife might talk with him at the plaintiff's door about the trade, and that would never be a forfeiture of the bond. And yet notwithstanding the verdict, this might be all that was done by the defendant's wife.

Upon the whole, therefore, I must submit it, that here is no consideration appearing upon the face of this bond, so as to establish it within the reasoning of the case of *Mitchell v. Reynolds*: that it is likewise void within the resolution of the same case, as being a general restraint, even though there should be a consideration: and therefore I pray that the judgment given below in favour of this bond may be reversed.

Whitaker Serjeant contra. The bond appears to have been taken at the request of the obligor in lieu of 100*l.* which the plaintiff would otherwise have had with an apprentice. I do not think myself obliged to maintain every part of the condition of this bond; I am afraid if the breach had been assigned upon the *elsewhere*, or upon the clause which speaks of executors and administrators, it might be difficult to support it: but what I rely upon as an answer in this case is, that the condition is good as to that part whereon the breach is assigned. This is not a bond which is made void by statute; but if any part of it is void, it is so at common law; and therefore according to the case in *Hob. 14.* it is sufficient to maintain the action, if the breach be assigned upon that part which is good.

As to the objection to the replication. We have followed the words of the plea, which will therefore be well enough.

Et per curiam. Here is a plain and a reasonable consideration for so much of the restraint as the breach extends to, which is no more than what was determined to be good in the case of *Mitchel v. Reynolds.* As to there being no covenant on the part of the plaintiff to instruct her, it is reasonable to suppose there was another distinct bond; though if there was not, yet the bond being accepted by the plaintiff would be a good evidence of the agreement.

The distinction out of *Hob. 14.* is certainly right. The agreement is a very reasonable one; for it is to give her the benefit of the trade, whenever she will pay what should have been given with her as an apprentice. The judgment of *C. B.* must be affirmed (1).

22 February 1727. on error in parliament the judgment was affirmed. There we took it up upon the general reason of the law, without regard to the case of *Mitchel v. Reynolds.* The twelve Judges all attended, and were unanimous for affirming.

(1) *Clerke v. Comer, Cas. temp. Harw. 53. Davis v. Mafes*
5 Term Rep. 118. S. P.

Toms et al' *vers.* Mytton,

At Westminster coram Raymond C. J.

Trover by the assignees under a commission against *Albertus Burnaby*, it appeared he was a bankrupt in *January 1724*. the debt of the petitioning creditor was a note dated in *September 1725*. And the Chief Justice was of opinion, it was a commission, the acts of a man after an act of bankruptcy void. So the plaintiffs were nonsuit (1). *Strange pro*

A debt contracted after an act of bankruptcy is no ground for a commission.

(1) *De Golls v. Ward, Forrest contra.* But determined in the old acts. See *Ambrose London, post. 1042. Ex parte Inham, Co. Bank. Laws 27.* the note had been drawn prior to the act of bankruptcy, and indorsed to the petitioning creditor afterwards, it would have supported the commission. *Anon. 2 Wils. 135. Ex parte Thomas, 1 Atk. 73. Bingley v. Maddison, Co. Bank. Laws 24.* and see the cases there cited.

Kellock *vers.* Robinson.

[745]

At Guildhall coram Eyre C. J. de C. B.

In an action by the indorsee of a promissory note against the indorser, it appeared the plaintiff had after the indorsement received part of the drawer of the note: and it was held to be a discharge upon himself to give the whole credit to the drawer of the note, and absolutely discharged the indorser. So the plaintiff was nonsuit (1).

Where part of a note is received of the drawer, the indorser is not to be resorted to for the rest.

(1) *Taffel v. Lewis, 1 Ld. Raym. 744. acc.*

Laferre vers. Johnson.

Idem vers. Emily.

RRQR of an award of execution against the defendants as bail on a writ of error: and it was objected by *Strange*, the 16 & 17 Car. 2. c. 8. has a proviso, that bail shall not be required of executors or administrators; and this being upon judgment against an executor, the court had no power to take a recognizance.

The executor is not obliged to give bail on error, yet the court may take it. *L. Raym. 1459. S. C.*

Sed

Sed per curiam, Though they could not require the defendant to give bail; yet if he will submit to do as other defendants do the court may take it, and it will bind the parties. The defendant in the action might for some other advantage agree to give bail on the writ of error: but be that as it will, here is a recognizance, which is not fulfilled; therefore the *scire facias* is proper, and the award upon it must be affirmed.

Dominus Rex vers. Inhabitantes St. Thomas in Southwark.

Preacher at
meeting-house
not liable to
poor's rate.

ONE *Read* was charged to the poor's rate in respect of his being an occupier of a meeting-house where he preached and on appeal to the sessions they discharged him, and the order being brought up by *certiorari*, it was confirmed. 1. Because a preacher he is no more chargeable as an occupier than any of his audience (1); it is not stated, that he let out pews, so as to make him a person that occupies and reaps a profit from it (2). 2. If he was liable, yet it must be expressly alleged, and the charging him in respect of his being an occupier is too uncertain (3).

- (1) The principal cases in which lands and tenements have been held not rateable for want of a beneficial occupier are *Rex v. The Occupiers of St. Luke's Hospital*, 2 Burr. 1053. 1 Black. Rep. 249. S. C. *Eyre v. Smallpace*, ib. 1059. *Rex v. Inhabitants of St. Bartholomew the Less*, 4 Burr. 2435. *Rex v. Peter Waldo*, Cald. 358. *Lord Amberst v. Lord Sommers*, 2 Term Rep. 375. *Rex v. The Commissioners of the Navigation of Salter's Road Sluice*, 4 Term Rep. 730. Nol. Rep. 90. S. C. *Rex v. Jacob Woodward*, 5 Term Rep. 79. Nol. Rep. 16. S. C.
- (2) That this would make him rateable vide *Robyn v. Hyde*, Cald. 310.
- (3) *Rex v. Occupiers of St. Luke's Hospital*, 2 Burr. 1063.

[746]

Dominus Rex vers. Inhabitantes de Portsmouth.

A servant before
3 & 4 W. & M.
needed not be
hired for forty
days.
2 Sess. Ca. p.
125. No. 117.
Ca. of Sett. and
Rem. p. 123.
No. 167.
Fert. 328. S. C.

IN 1690. it was stated, that a person was hired by a captain who was quartered at *Portsmouth* as a weekly servant; and that he continued there forty days, and was mustered as a common soldier: and this being before the act 3 & 4 W. & M. c. 11. the question was, whether there should not have been hiring for forty days and notice. As to the notice it was held not to be necessary on the authority of the case *Rex v. Warmaster*, ante 470. And as to the retainer, it was held that it need not be for forty days, but that a continuance forty days without any retainer was sufficient. But the court quashed the order because it was not said that he staid as a servant forty days; the contrary it appears he was mustered as a soldier, and there can be no intendment either way.

Between the Parishes of Paulsbury and Woodon.

UPON a special order of sessions the case appeared to be, that a man with his wife and child were settled in *Paulsbury* at his death: after which the wife removed to a copyhold of her own in *Woodon*, and carried the child being fourteen years old with her, and it lived there many years. And now it came to be a question, where the child was settled; and the justices judge, that it gained no settlement with the mother, and therefore send it back to the father's settlement in *Paulsbury*.

A child may gain a new settlement with the mother after the father's death.

L. Raym. 1473.

2 Sess. Ca. p.

124. No. 116.

Fol. 296.

Fort. 328.

1 Barnard B. R.

11. S. C.

And upon consideration the court quashed the order, saying it had been adjudged to be settled with the mother, *Mich. 1 Geo.* between the *Parishes of St. George and St. Catherine (a)*. But if it had been *res integra*, they should have doubted, whether a settlement gained under the head of the family, could be vested by a derivative one from the inferior (1).

(a) Vide this

case reported in

L. Raym. 1474.

1 Sess. Ca. 73.

pl. 69.

Fort. 218.

(1) *Rex v. Barton Turfe, Burr. Rex v. Long Wittenham, 2 Bott by C. 49. Rex v. Oulton, ib. 64. Const 41. pl. 68. S. P.*

Swayne et al' *vers.* Wallinger.

At Guildhall coram Eyre C. J.

A Commission of bankruptcy issued in 1726. and the debt of the petitioning creditor appeared to be a promissory note in 1744. And the Chief Justice allowed it to be good, saying that though six years were passed, he could not presume it to be void (1). *Strange pro def.*

Note of above six years standing ground for commission of bankruptcy.

(1) *Quantock v. England, 2 Black. 703. Fowler v. Brown, Bank. Laws 15. S. P.* For debt still exists, and no one the debtor can avail himself the statute of Limitations. But where the bankrupt himself applied to set it aside upon this ground, it was done. *Anon. Mosely 37.* and see the reasoning of the judges in *Bickerdike v. Bollman, 1 Term Rep. 405.*

Sir William Saunderson *vers.* Brignall.

[747]

At Guildhall coram Pengelly C. B.

THE plaintiff brought an action of the case for fees due to him as usher of the black rod, and obtained a verdict. *Strange pro def.*

Fees to usher of black rod recovered.

12 Mod. 607.

Dominus Rex *vers.* Johannem Ward, Arm.

Forging a receipt for goods which defendant is bound to deliver is punishable at common law. If the information charges that *N. existens onerabilis* to deliver &c. did with intent to defraud, forge an indorsement &c. it is sufficient, for it is not necessary to shew an actual prejudice, a possibility is enough.

2 L. Raym. 1461
S. C. much fuller.
3 Barnard. B. R. 10.
Raym. Ent. 538.

AN information was exhibited in the name of the Attorney General, charging that Mr. *Ward existens onerabilis* to deliver to the Duke of Bucks 315 tun and one quarter of allum at *certum diem jam præteritum*, did with intent to defraud him thereof, forge an indorsement on the back of a certificate in the words and figures following, "Mr. *John Ward*, I hereby order "you to charge 660 tuns and one quarter of allum to my account, part of the quantity here mentioned in this certificate, "and for your so doing this shall be your discharge. *Buckingham*, April 30, 1706." The information likewise charges a publication of it knowing it to be forged. Upon Not guilty pleaded, it was tried at the bar, and a verdict found for the King in *Easter* term 12 Geo. The defendant absconded till the last day of *Michaelmas* term, when he voluntarily came into court and desired to be bailed: but the court refused it, and so he was committed.

And now in *Hilary* term his counsel (Mr. *Hungerford*, Mr. *Ketelbey*, Mr. *Filmer*, Mr. *Bootle*, and Mr. *Strange*) took some objections in arrest of judgment, and what they principally relied upon were these,

1. That this is not such a paper, of which a forgery could be committed at common law. This is laid as an offence at common law; and *Hawkins* in his *Pleas of the Crown* 182 (a) says, that it must be of a matter of record, or any other authentick matter of a public nature, as a deed or will: other writings of an inferior nature, as forging the hand of authority to receive rent, counterfeiting a letter made in another man's name, &c. are (says he) more properly punishable as cheats on the 33 *H. 8. c. 1. in Cro. El.* 166. it is held not actionable, to say, "You have falsely forged your father's hand, and thereby falsely have procured your father's tenants to pay their rent to you;" because it would not be forgery, if he had done so. 1 *Roll. Abr.* 66.

2. It does not appear he was chargeable to deliver the allum at the time he did the fact. *Existens onerabilis* is at the time of the information (1), and then it wants one necessary ingredient

(1) The information was thus, "Memorandum, That the Attorney General Wednesday *proxime*, *post tres Trin.* 11 Geo. (which was in *Trin.* term 1725) comes and informs the court that the defendant *onerabilis existens ad deliberandum* 315 tons of allum to the Duke of B. *ad certum diem jam*

præteritum, he the said defendant contriving and intending the said Duke of the said allum to defraud, *et ea intentione* to avoid the delivery of the said allum, 1 Feb. 11 Geo. (which was in *Feb.* 1724) forged the said indorsement," 2 L. Raym. 1466.

(a) Hawk. P. C. c. 70. s. 11. p. 339.

to make it a forgery at common law, which is that it be to somebody's damage.

Mr. Attorney, Mr. Lee, Mr. Marsh, Mr. Fazakerley, and Mr. Verney, *e contra* argued, that this was a forgery at common law; and that it was the highest reflection upon the law, to imagine there was a time, wherein such a fact as this was not punishable by the law of *England*. As to the passage in *Hawkins*, it is not warranted by the authorities quoted in the margin, and he has laid it down much too large. *Sti.* 12. is an indictment at common law, for forging letters of credit to raise money, and no body imagined it did not lie; and there it is not laid that he actually received money upon it, which makes the case an answer to both exceptions. 5 *Mod.* 137. *Salk.* 342. Indictment for forging a bill of lading. 1 *Sid.* 142. Counterfeiting a protection from a member of Parliament. *Salk.* 406. *Hil.* 32 *Car.* 2. rot. 35. *Rex v. Sheldon*, for forging a bill of exchange. *Ray.* 81. The like for forging a warrant of attorney. *Mich.* 6 *Geo.* *Rex v. Ward* (a brother of the defendant). Indictment for forging a promissory note, and laid at common law; and never imagined it was not an offence; and the defendant was convicted. 1 *Sid.* 71. 3 *Leon.* 170. is for forging the entry of a marriage. It could not be an indictment as a cheat on the 33 *H.* 8. because there must be an actual obtaining, upon that statute.

As to the *existens onerabilis*, it is not necessary to shew an actual damage, a possibility of damage is sufficient. There was no money raised in the case in *Stiles*. And if it was a bond, the party cannot be hurt by a forged one, and yet the forger shall be punished. The jury have found that it was done with design to avoid the delivery, and defraud the Duke, which is sufficient. But to take it as strong as possible, and make *existens* relate to the time of the information; yet surely it will be a forgery, though done before the time was actually come in which he was to deliver it. If a man is to pay money at a future day; shall his forging a release before the day, and keeping it by him till the time comes to make use of it, be no crime? If it imports a prejudice, it is a crime at common law. *Mo.* 619. *Noy* 99.

1 L. Raym.
527.
Salk. 375.

To this it was replied by Mr. Ward's counsel; that no case was cited where it was determined to be an offence at common law, and the precedents cited passed *sub silentio*. That there was no reflection on the law, for this ever was punishable, though not as a forgery, but a cheat: they did not say it was no crime, but was not *this*. That this was an obtaining within 33 *H.* 8. because he obtains a right to keep that allum, which otherwise he would

would be obliged to deliver to the Duke. And the preamble of 5 Eliz. c. 14. which takes notice of these offences, and calls them *notable* ones; yet complains of the mild punishment that was inflicted at common law, which is an argument they were not punished as forgeries.

Per curiam, As there is no judicial authority on either side, we must take it up upon the reason of the thing. There is no reason why this should not be punished as a forgery, as well as if it was a deed; the injury may be as great, or greater, for the value may be 100,000 *l.* in one case, and a deed perhaps affect only a single acre of land. The statute 5 Eliz. shews this to be a crime, by using the word *writings*, in contradistinction to *deeds*. It cannot be prosecuted as a cheat at common law, without an actual prejudice, and that is an *obtaining* on the 33 H. 8. The case cited out of *Cro.* is not law, and surely those words are actionable. *Regina v. Travers* was forging an indorsement on an army debenture, and laid as at common law. The reason why we do not meet with ancient determinations is, because personal credit was formerly small, and these writings not made use of. It is not necessary to shew an actual prejudice, a possibility is enough; and here it appears, there would have been one, if the forgery had stood (2). *Judicium pro Rege. For Devid*

Afterwards he was sentenced to stand in the pillory before *Westminster-hall* gate, (which he did) to pay 500 *l.* and find sureties for seven years, and commitment till all was performed.

(2) It was likewise objected, 1. That it was not shewn how the defendant was chargeable to deliver the allum; whether it was by obligation, deed, &c. But it was over-ruled, the forgery being the gift of the information, and this but an inducement. 2 *Ld. Raym.* 1468. 2. That the word *tons* in the certificate imported a measure by weight, whereas *dolium* signified a liquid measure, but over-ruled for it signifies a ton. *Littleton's DiR. Townsend's Prepar.* 145. 2 *L. Raym.* 460. 1 *Barnard B. R.* 10. 3. The information used *Contrafecit* instead of *Controfecit* but held good. *Co. Intr.* 360. 2 *L. Raym.* 1468. 1 *Barnard. B. R.* 10. 4. That the instrument was not laid to be

published as well as *forged*. *Sed non alloc.* for the forgery was punishable though the party was not actually prejudiced by it, if he might be so. 2 *L. Raym.* 1469. 1 *Barn. B. R.* 10. 5. That there was no entry on the record that proclamation was made *if any body would inform the King's justices*, &c. but over-ruled for that it is only for the benefit of the King. *Coke Intr.* 353. 6. A disagreement between the *venire* and the *disfringas* in the one, the issue being joined between the King and the defendant, in the other between the Attorney General and him, but over-ruled. 1 *Barnard. B. R.* 10.

Dominus Rex vers. Robertum Mann. In Scaccario.

UPON 5 October 7 Geo. Mr. Baron Price granted his *fiat* for an extent against *Daniel Norcott* and *Joseph Norcott*, whereupon an extent was taken out into London, *teste* 6 July anno 6 Geo. which was the last day of the Trinity term preceding, and it was subscribed at the bottom of the writ *fact' per warrant' Baron Price, dat' 5 die Oct' anno 7 Regni Regis*. Upon this extent an inquisition is taken, and several goods and debts are found: and then the defendant *Mann* comes in and claims property in the debts and effects; and to make it out he first prays averment of the bond entered into by the *Norcotts* to the crown, which appears by the condition to be a security for *Jeay* and *Dowse* as receivers general of the county of *Huntington*. Then he prays averment of the extent and the *fiat, quibus lectis*, he pleads, that by the course of the Exchequer these writs have time out of mind issued out of term by virtue of a baron's *fiat*, and not otherwise; and that the *fiat* in this case was granted 5 October, and not before, and that the writ of extent *in rei veritate* issued the said 5 October, and not before. That the several persons named in the inquisition to be debtors to the *Norcotts* were so indebted long before the extent, and at the time of the act of bankruptcy after mentioned, and that the *Norcotts* before and at the time of the said bankruptcy were possessed of the effects found by the inquisition, and being so possessed of those debts and effects, and the *Norcotts* having for several years been goldsmiths and partners, they became indebted to the defendant *Mann* and others in 500 l. and 3 October 7 Geo. withdrew from their house for fear of being arrested for just debts, and with intent to defraud their creditors, and thereby committed an act of bankruptcy. That upon the same 3 October a petition was exhibited by the creditors, and a commission of bankruptcy issued against the *Norcotts, teste* 3 October, anno 7 Geo. upon which the commissioners met the next day, and found them to be bankrupts; and that they being possessed of the effects and intitled to the debts mentioned in the inquisition, the commissioners the same 4 October assigned to the defendant an act of bankruptcy, and had been declared bankrupt, and a provisional assignment of his goods, debts, &c. made to defendant under the commission prior to the extent; and then traversed that at the time of the inquisition the persons therein named were debtors to the party, or that he was entitled to the goods mentioned in the inquisition, this traverse is proper and neither immaterial nor idle. A commission of bankruptcy and assignment is a good bar to an extent at the suit of the crown subsequently (1). *Bunb. 164. The argument of Mr. Strange, pro defendant. Gibb, Chan. Rep. 222.*

An extent cannot be antedated but must bear *teste* at the day it issues, though it be out of term, for it issues out of the equity side of the Exchequer which is always open. *Quare* whether this can be taken advantage of upon plea, being an averment contrary to the record. But the writ will be superseded on motion as irregular. Oyer of the Baron's *fiat* cannot be had, but being upon the writ the court are bound to take notice of it. In a proceeding upon an extent *tested* 6 July against the surety of a debtor of the crown, an inquisition taken of several goods and debts found; the defendant claims property in the debts and effects and pleads that the *fiat* was granted 5 October, at which time the extent in reality issued; that the surety

(1) *Vide Brassey v. Dawson*, are upon the same day, the crown shall be preferred. *Park. Rep. 978.* But if the date of the assignment and *teste* of the writ 126. *Rex v. Earl, Bunb. 33.*
Vol. II, G defendant

defendant all the goods, chattels, debts and effects of the *Norcotts*, in trust for himself and the other creditors, by virtue whereof the defendant was possessed, and so continued till the sheriff seized on the extent: and then traverses, that at the time of the inquisition the persons therein named were debtors to the *Norcotts*, or that the *Norcotts* were intitled to the goods mentioned in the inquisition, wherefore he prays an *amoveas manus*. To this plea the Attorney General demurs, and shews for cause, that the defendant ought not to have had *oyer* of the *fiat*, and that the traverse is double; and the defendant joins in demurrer.

Boote pro Rege argued, that this was an ill plea both in form and substance; and as to the form,

1. That the traverse was immaterial, the former matter set forth in the plea confessing and avoiding the crown's title, upon any part of which matter the crown might take issue. *Dy.* 366. *Mo.* 551. Or if a traverse was necessary, yet the first traverse covers the whole, and there was no occasion for the second.

2. The *fiat* is not material, and it is what the defendant ought not to have *oyer* of. 7 *E.* 4. 8. 10 *H.* 7. 18.

3. It is improper, to plead that a writ issued at a time which is contrary to what the writ itself imports. 1 *Sid.* 271. The *fiat* is only to controul the clerks, but has no operation as to the *teste* of the writ; the emanation of it is the act of the court, and not of a single baron; and if a writ issued without any *fiat*, yet it would fall within the rule; *Fieri non debet, factum valet*; like the case of an execution whereon the sheriff breaks open doors, the execution is well executed, though the sheriff has done more than he can warrant.

As to the substance of the plea, I do insist that the court may antedate an extent, and this extent bearing *teste* 6 July, will bind the goods from that time, 8 *Co.* 171. and then it over-reaches the bankruptcy and assignment. This is no more than what is done every day in the case of the subject, who takes out his execution *teste* the last day of the preceding term; and which has the same effect at common law, to bind the goods from the *teste* as the execution of the crown has now. The King's prerogative is *ab origine legis*, *Godb.* 250. and he might take the body of a debtor, though the subject could not, till the writ of *capias* and *habeas corpus* was given by statute. He might break open a house on his execution, which could not be done upon an execution on the suit of a subject. 5 *Co.* 91, Sir *T. Jones* 234. He might

grant a protection against any subject's demands upon the King's debtor, till the debt of the crown was satisfied. *F. N. B.* 28. *Regist.* 281. And if in this case he might have granted the *Norcotts* a protection, the other creditors are not in a worse condition upon this extent. The court of Exchequer is a court of revenue, and must issue such process, and of such *teste*, as the nature of the case requires. 41 *E. 3.* *Fitzh. Ex.* 38. *Dy.* 197. 45 *E. 3.* *Fitzh. Decies tantum* 12. *Godb.* 290. In *Dy.* 67. an extent came before a *liberate*, and the sheriff was directed to prefer the King. Before the statute of frauds and perjuries the subject had the same right, which the crown (as not being bound by the statute of fraud) retains to this day, *Cro. El.* 174. 1 *Leon.* 304. *Cro. El.* 440. *Mo.* 21, 873. and should over-reach any sale, though for a valuable consideration. 1 *Sid.* 271. Or even though the party was dead. 1 *Mod.* 188. 1 *Leon* 245. *Trin.* 11 *W. 3.* *B. R. Oats v. Dr. Woodward.* *Trin.* 9 *W. 3.* *B. R. Pennoir v. Brace.* Are not the inconveniences in those cases as great as in this?

L. Raym. 766,
849.
Salk. 87, 116.
Holt. 401. *S. C.*
L. Raym. 244.
Comb. 441.
S. C.

But it should be doubted, whether this writ could be thus issued at common law; yet I apprehend that by the statute 33 *H. 8. c.* 39. § 7, 8, 25. the court have this power. It is left to them, to issue process for the King's debt according to their discretion; the words, after giving instances, are *or otherwise at their discretion*. This is a case wherein to exercise that discretion; it appears the crown is to be over-reached by these hasty proceedings upon the commission, which will have this consequence, to sweep away the effects, and totally exclude the King, who cannot come in and prove his debt upon the commission; and the only fence we had against those quick proceedings was, by testing our writ backward. A debtor might be protected for two years, *Regist.* 281. we only carry it back for three months. In *Hardr.* 125. a *diem clausit extremum* was made *teste* the last day of the precedent term, and held right; and in July 1712, *Regina v. Ellins et Farrington*, an extent was ordered to be made out *teste* 8 November 1711.

[752]

This, in its nature, is a case of great consequence to the crown, and will, in many instances, be of dangerous tendency, if the crown cannot have the liberty of fencing against these exorbitant proceedings upon commissions, which are taken out without notice, by making the process in such a manner as shall secure the debt of the crown. Therefore the plea being ill, both in form and substance, I pray judgment for the King.

Strange contra, It is truly said, that this is a matter which very much concerns the crown in point of revenue, and that your

Lordship will at all times, and upon all occasions, take particular care of the prerogative: but I may be admitted at the same time to observe, that this is a case too, wherein the property of all the subjects of *England* is very highly affected; for if the practice which is now contended for, be allowed to prevail, no man can be safe in transacting with another, who has any thing to do with the money of the crown.

The case has been fairly opened by Mr. *Bootle* as it stands upon the record; and as to the objection, that we are improper to take advantage of the antedating the extent, upon a plea, as averring against the record, which imports it to have issued on the 6th of *July*; I must own I am a little surprized to find that matter so strongly insisted upon, after what has already passed in this cause. It is in the memory of every body who attends this court, how much we pressed to have this writ superseded, as a writ that had irregularly issued; and we then offered the distinction between an erroneous, and an irregular proceeding, that one might be taken advantage of by writ of error, or by plea, and that the other (which depended upon the practice of the court) was proper to be redressed by motion; but the court being of opinion, that we might have advantage of this matter upon a plea, we acquiesced; and having now pleaded it in consequence of that opinion, it is very extraordinary to see how the argument is turned upon us by the other side: when we moved on the irregularity, we were told by them it was a matter we might have advantage of by plea; and now we have pleaded it, they object against it for that reason.

[753]

In *Lutw.* 322. 1 *Lev.* 173. 1 *Sid.* 273. there are instances of these averments, that writs did not issue till a day subsequent to the *teste*: I cannot say the judgment of the court is either way upon those cases, but since in this case the court have already given their opinion, that this was a matter pleadable, I do not think myself any otherwise concerned to answer this objection.

If I rightly apprehend the design of the court in refusing to relieve us upon a motion, it was in order for the most solemn determination of a point of this prodigious consequence; and since this was a method not invented by us, but prescribed by the court, in order to bring that point before them in judgment; I little expected to hear a matter of form insisted on, when I apprehended we should be confined to the merits of the question; and as it was brought before the court upon record with that only view, we must rely upon the justice of the court, that we shall suffer no prejudice by putting this question into one or other method of determination.

Taking

Taking it therefore for granted, that we are properly before the court upon this plea, I shall beg leave to observe, that Mr. Attorney having demurred to the plea, has thereby admitted all the facts contained in our plea, (*viz.*) that in reality the extent did not issue till 5 *October*, before which there had been a regular commission of bankruptcy and assignment: and that this is a bar to the extent appears from *Capel's case*, 2 *Show.* 480. where a prior commission of bankruptcy and assignment was held a good plea to an extent. So 2 *Roll. Abr.* 158. G. 2. where a subject extended lands and goods, and after seizure, but before a *liberate*, there came a prerogative writ, which had place, because there was not an actual execution of the *liberate*, as there was not likewise in the case cited out of *Dyer*; but in that case it is not pretended it would have avoided the subject's extent, in case there had been a compleat execution. Post. 978.

That these writs issue tested in vacation, is a fact nobody will deny: your Lordship's records afford a thousand instances of that nature, and none of them bear *teste* before the *fiat*, except in one instance, which I shall account for by and by: that in *Capel's case* was *teste* 24th *December*, which must necessarily be out of term.

But then it is objected, that the subject's execution bears *teste* the last day of the preceding term, and that at common law the goods were bound from that time; and why then, say they, should the crown be in a worse condition than the subject, especially since it must be admitted, that the crown is not bound by the statute of frauds and perjuries. [754]

To this I answer, that there is a very material difference between the case of the crown and that of the subject; the subject, it is true, has his writ *teste* the last day of the preceding term, because he has run through the whole course of a judicial proceeding, and his cause was ripe for execution at that time, and he can have no process *teste* out of term; whereas the King by his prerogative may have execution awarded out of term, and that in the first instance: and if he has an immediate execution upon that award, he is not in a worse condition than the subject; nay, he is in a much better, for the subject must stay till the next term, if his cause was not ripe for execution.

And this differs it from the case of a *certiorari* made out in vacation *teste* the last day of the preceding term, where there is a necessity to *teste* it in term time, it not being a prerogative writ; and besides it is of no consequence in the case of a *certiorari*, which removes all orders, though after the *teste*, so as they be before the return.

And

And I take the true reason why this is not provided against by the statute of frauds is, that it was not a practice so much as thought of at that time, it was certainly a case within equal mischief. No doubt but there have been many occasions to antedate extents before this; and the never doing it till now is, according to *Littleton*, a strong argument against the legality of doing it at all. *Capel's* case cited before was 2 *Jac.* 2. and even then there was no thought that it might have been *tested* backwards, so as to over-reach the assignment, though every body knows matters of prerogative went very high at that time.

And as this is a novelty in law and practice, I beg leave, in the next place, to consider a little what will be the consequence of it. The goods, without question will, in the case of the crown, be bound from the award of execution, according to Sir *Gerard Fleetwood's* case, 8 *Co.* 171. Now the award of execution is, in point of time, the *teste* of the writ; so that all transactions by the bankrupts, all sales *bona fide* for a valuable consideration, and all payments by them made in the way of trade, between 6 *July* and 3 *October*, will be avoided; which will introduce great confusion.

2 Com. Dig.
Debt.
(G. 3.) (G. 4.)
(G. 9.) 373.
4 Com. Dig.
Execution.
(B. 3.) (B. 5.)
(B. 6.) p. 117.
et seq.

[755]

By the law the King's execution relates, as to land, from the date of the bond given to the King, and as to goods, from the award of execution; but by this means it may be made to relate to a time precedent even to the being in debt; for a debt may be contracted in vacation, and the execution, according to this new practice, shall issue before any debt. The process must be awarded for the debt, and must recite the bond entered into to the crown: in this case, indeed, it was four days old at the *teste* of the writ; but what an absurdity will it be, if it should happen to bear date after the term? which may be the case. It has been thought a little hard, to make it relate, as to lands, to the date of the bond, which could not appear to a purchaser: but it will be much harder, if it be suffered to relate to a time before the being in debt.

Hard. 98.
1 Will. 207,
223, 225.
2 Sess. Ca.
342.
3 Burr. Rep.
1755.

The practice of every court is the law of that court; and it has been so strictly adhered to, that in the case of *Beudley* a practice of seven years only was allowed to prevail against the express words of an act of Parliament.

I would therefore, in the next place, consider this writ upon the practice, and the 33 *Hen.* 8. c. 39. § 35. That act says, "That the King's process shall be preferred, and he shall first have execution, so always that the King's said suit be taken and commenced, or process awarded for the said debt at the suit of the King, before judgment given for the said other person."

Upon

Upon this act, I take it, the suit must be said to be *then* taken and commenced, *when* the first step is made towards proceeding to execution. The first step to be taken is to procure the *fiat* of a Baron, and then it is that in fact the process is awarded; so that upon the foot of the act of Parliament, this was not a suit taken or commenced, or a process awarded, till the assignment of the defendant had taken place. It is said that the court has a discretionary power by the statute 33 *Hen. 8.* but that is only to act according to law; the statute does not leave it to your Lordship's discretion to act contrary to law, which is what is contended for by the other side. This court will take notice of its own practice, and therefore since it appears upon the record, that there was no *fiat* till 5 *October* you will take notice that such a writ as this could not issue according to the course of the court; and then, whether we can be admitted to say, that in fact it issued at a day subsequent to the *teste*, will not be material; since it appears to the court to be so without our averment.

I did mention before, that there had been one instance of antedating an extent, and that was the case of *The Attorney General v. Quash* in 1713. There the *fiat* was the 24th *February*, and the writ taken out upon it was *teste* the last day of the preceding term, which was 12th *February*: and after great consideration and search of precedents, that writ was set aside, upon account of the novelty and consequences of such a practice. So that, as to precedents, your Lordship will consider how the case stands. Here is a new sort of writ taken out, and the only instance of such a writ is an instance wherein it was set aside; they who would introduce this practice, are to justify it by precedents, and we say there are none on that side, but that every extent which bears *teste* in vacation is a strong precedent in our favour; since if it might have been *tested* in the precedent term, it is impossible to think so great an advantage would not have been taken.

[756]

As to the precedents cited by Mr. *Boote*, that of a *diem clausit extremum*, is nothing to the purpose, for there was a necessity to *teste* it in term, it not being a prerogative writ; and as to the case of *The Queen v. Ellins*, that was no more than ordering a new writ to be made out of the same *teste* and return of a former, that had been lost, and for which there was a regular *fiat*.

If this be a prerogative, it is, like all others, to be proved by usage, and yet there is no pretence of usage to support it; if the crown has engaged by *Magna Charta*, not to run upon the subject, *nisi per legem terre*. let them shew us the *lex terra* by which this extraordinary proceeding is to be warranted.

And as to the argument drawn from other prerogatives; that the King has other prerogatives, which may be as inconvenient to the subject as this, and therefore why should he not have this; surely that is the most absurd way of reasoning in the world: we are upon a single question, whether he has this prerogative or not; and if it cannot be shewn he has, it is to no purpose to talk of protections or other legal prerogatives, which are not disputed.

There having been so great an alteration in this court since the time of the motion, it may not be improper to mention what seemed to be the opinion of the court as to the merits of this question. Lord Chief Baron *Bury*, and *Mountague*, were both of opinion, the writ was illegal, and would have superseded it; Mr. Baron *Price* and Mr. Baron *Page* indeed were for having it pleaded: but I did not observe that the opinion of either of them was, that the writ was right.

[757]

Ante 97.
Fort. Rep. 360.
8 Ann. c. 14.

Your Lordship will consider this extent upon the foot it stood on 6 July, when the bond was but four days old; and if at that time there was no ground for this proceeding, it is not to be supported by matter *ex post facto*, by a mere relation and fiction of law, which ought to divest no right that has been once legally vested. For this purpose I beg leave to mention a case that was in *B. R. Trin. 4 Geo. Waring v. Dewberry*: there a landlord, who had rent due to him, died intestate, after which the plaintiff in the action sued out execution against the defendant, who was the tenant, and levied the debt upon it; after this, administration was committed to J. S. who thereupon came into court and moved for a rule on the sheriff to pay him a year's rent out of the money levied, pursuant to 8 Ann. c. 17. urging that though he was not administrator at the time of serving the execution, yet as soon as the administration was committed, it had relation to the death of the intestate, and he might bring trover for goods taken between the death of the intestate and the commission of administration. But the court held, that relations which are but fictions of law, should never divest any right regally vested in another *mesne* between the death of the intestate and the commission of administration; and that the plaintiff in the action, having duly served his execution before the administrator had a right to demand his rent, it was not reasonable the plaintiff should be defeated by any relation whatsoever: they did not in that case deny the authorities which give the administrator trover by relation, but went upon a distinction that will govern this case, between relations that are to defeat lawful acts, and such as are to punish those which are unlawful.

An objection was taken, (and indeed it is mentioned in the demurrer) that we should not have had *oyer* of the *fiat*; but if your Lordship casts your eye upon the writ itself, you will find, that is indorsed upon it, and made part of the record, and appears in their setting out the extent: in the common case it is marked at the bottom of the writ, but they were so sensible of the absurdity of a *fiat* in *October*, for a writ had issued in *July*, that in this particular instance they have deviated from the common form, and have modestly indorsed it upon the back of the writ.

The traverse is objected to; but surely that is very proper, and the crown may take issue either on the inducement, or the traverse; it was necessary to put the matter of the bankruptcy and the assignment in issue, and as we plead to the inquisition, we must traverse that which is the point of it: and it is not a double traverse, but two distinct matters; the first covers the debts, and the second the effects found by the inquisition.

Upon the whole therefore, it is certain that his Majesty has many great and valuable prerogatives; and may he long live to enjoy them in their full extent. Our own experience of the happiness of his government may assure us, that he desires only to make the law of the land the measure of his actions: and it is some pleasure to observe, that this single attempt to stretch the prerogative beyond its due bounds, proceeds only from a private dispute between two co-obligors in the same bond to the crown, and wherein it was necessary to make use of his Majesty's name, though he is not at all concerned in point of interest. It is one article of the bill of rights, that the late King had under pretence of prerogative levied money on his subjects in other manner than was warranted by the laws of the land; and yet it does not appear that this practice now set up, was attempted even in that reign: and we live in times so much happier than those, that it will be sufficient to confute this doctrine, if we only shew (as I have done already) that it is an unprecedented attempt to stretch the prerogative of the crown to the subversion of the liberty and property of the subject.

[758]

In the case of the King v. Mann, H. 1726. in the Exchequer it was expressly laid down by Ld. Chief Baron

Pengelly C. B. This is a matter of very great consequence to the revenue, to the method of proceeding, and to the subject. We take it to be our duty on all these considerations, to maintain the prerogatives of the crown, but not to raise any new ones:

Pengelly, that whoever pleads to the title of the crown found by an inquisition is obliged to traverse that title so found, and not to put the crown to traverse the title set up by the defendant, or to force the crown to take a traverse; tho' the crown has an election to traverse the inducement or title set out by the defendant. *Palm. 81. Keilw. 175. a. and T. Jo. 9, 10* are to the same purpose. *Park. Rep. 139, 11. note to 2d. edition.*

every

every prerogative that is not affected by the interposition of an act of Parliament, must depend upon prescription only, and we must have the same evidence of a prerogative, that we have of all other prescriptions.

I should have thought this a matter far more proper to be determined upon a motion, than by special pleading; for as has been observed, this is more a matter of irregularity than error, and I apprehend it never was the intent of the court, to deprive the defendant of any legal benefit, by putting him into this method; if therefore this is improper for a plea, I shall be of opinion still to turn it into a motion again, and set aside the extent as irregularly issued.

As to the *oyer* of the *fiat*, that cannot be had: but then it being set out in the very writ, it is before us, and we must take notice of it.

I am afraid we shall be under great difficulty how to do the defendant justice upon this record; we cannot give judgment for him, unless he makes out a title, which if the matter pleaded be improper for a plea, he can never do.

[759]

I think the traverses are not double: and being a plea to the title of the crown, which the defendant was bound to answer, it was proper to add the traverse, which is for the benefit of the crown, by giving them an opportunity of taking issue on the traverse, or any part of the title before set forth: this is the usual way of pleading upon outlawries.

As to the principal question, whether this extent can be antedated or not: I must observe, that they issue from the equity side of the court, which is always open: if the usage has been to have a *fiat*, and *teste* the writ the day the *fiat* is granted, I should think the *fiat* was in the nature of an award of the court, which formerly sat longer than it does now; and now when it is not sitting, a *fiat* is to be had at a Baron's chamber, and that is an evidence that the writ and *fiat* ought to tally with one another.

Park. Rep. 281.
S. C. but not
S. P.

I think the usage must determine in this case. There is no instance of antedating, where it has been allowed; for as to the case cited by Mr. *Beotle*, that was only the continuance of a writ that had regularly issued. On the other side there is the consideration that such a thing was never attempted before, and there is *Quasb's* case, which is a judicial authority: that was in a manner given up at the bar by Sir *Edward Northey*, who was the Attorney General, and who was known to be enough tenacious

of the rights of the crown; and the court in their judgment treated the extent as a writ that had issued without any *fiat* or authority.

If this be a novelty it is not to be supported; at present it seems to me to be so, but it is proper to be farther considered.

Baron *Hale*, If this is to go against the defendant upon a point of pleading, it would be exceeding hard. But rather than so, I think the court is bound in honour to interpose, and turn it again into a motion. I think this is a very extravagant attempt, and have wondered ever since I heard of it, upon what foundation it could be supported. I do not now find any thing offered to that purpose, and think there is no such prerogative as has been exercised in this case. The crown is in a very good condition by having this extent as their first process; it is hard enough upon the subject, and we ought not to enlarge the prerogative.

Baron *Carter*, No such writ can regularly issue before a *fiat*, which ought to be the direction in making the *teste*. It is impossible to foresee the ill consequence of allowing those writs to be antedated; and it is considerable, that in all the time this court has sat, it never was attempted before.

Baron *Comyns*, Surely this is much properer for a motion than a plea, and it can never be determined according to justice upon the record. The *teste* is matter of record, and I think we are obliged to take it to have issued at the time of the *teste*, and there can be no averment against it.

[760]

As to the statute 33 H. 8. I think that does not leave it to our discretion, to alter the course and nature of proceedings, or to do a thing that was never done before, and may have such mischievous consequence. *Per curiam, ulterius concilium.*

Afterwards in *Trinity* term following, I moved to set aside the extents upon the point of irregularity, and Mr. Attorney General consented, so nothing further was done upon the pleadings.

And *Trin. 2 Geo. 2. Rex v. Vanderplank*, another of the same nature, which had attended the event of this, was also set aside. Bunb. 165. n.
S. C. S. P.

Easter Term

13 Georgii Regis. In B. R.

Sir Robert Raymond, Knt. Lord Chief Justice.

Sir John Fortescue Aland, Knt.

James Reynolds, Esq;

Sir Edmund Probyn, Knt.

} *Justices.*

Sir Philip Yorke, Knt. Attorney General.

Charles Talbot, Esq; Solicitor General.

Buck vers. Atwood.

Where a deed comes in by incident, the Admiralty may try whether it was fraudulent.

THE mariners sue in the Admiralty for wages; and a deed is pleaded to have been made at land, whereby the mariners agree to subject themselves to the loss of their wages on particular circumstances; and it being replied thereto, that the deed was obtained by fraud and circumvention, it is so declared below, and a sentence for the wages,

It was then moved for a prohibition, because the Admiralty has no original jurisdiction for wages, but it is connived at for the ease of the mariners, who may join in the suit, which they cannot do at law: but then it must be upon a parol contract, and not a deed; and here being a deed made at land, that is the subsisting contract, and will merge the other. *Salk. 31. (a).*

(a) 21 Mod. 38.
S. C.

Vide post. 968.

Sed per Curiam, This is only a deed on one side, to forfeit the wages upon particular circumstances; but will not enable them to sue for their wages at law. The deed therefore comes

in only by way of incident, and then they may proceed to try it. There can be no prohibition.

Macleed vers. Snee.

ERROR of a judgment in *C. B.* wherein the plaintiff declares, that *A. B.* drew a bill of exchange dated 25th of May, whereby he requested the defendant one month after date to pay to the plaintiff or order 9 *l.* 10 *s.* "as my quarterly half-pay, to be due from 24th of June to 27th of September next, by advance." And the action is against the defendant upon his acceptance.

What is a bill of exchange.
L. Raym. 1481.
1 Barnard B. R.
12. S. C.

It was objected, that this was no bill of exchange, because it is not to pay in all events, but is left to the pleasure of the person on whom it is drawn, either to advance the money or not: and it was compared to the case of *Jocelyn v. Laferre*, which was to pay out of his growing subsistence, and to the case of *Jenney v. Herle*, which was payable out of a particular fund, and in both cases held to be no bills of exchange.

Fort. 281.
10 Mod. 294.
316.
Ante 591.

Sed per curiam, The quarterly half-pay is a certain fund, which the growing subsistence was not: the mention of the half-pay is only by way of direction how he shall reimburse himself, but the money is still to be advanced on the credit of the person. The reason it was held no bill of exchange in *Jenney v. Herle* was, because it was no more than a private order to a man's servant. Judgment affirmed.

Stanton vers. Smith.

UPON demurrer it was held actionable, to say of a tradesman, *You are a very pitiful fellow, and a rogue, and compounded your debts for 5 s. in the pound; for it is in effect calling him a bankrupt.*

Words actionable.
L. Raym. 1480.
1 Com. Dig.
Action upon the case for defamation (D. 25.)
p. 260.

Monk vers. Cooper,

[763]

COVENANT for non-payment of a year's rent from Michaelmas 1725. to Michaelmas 1726. The defendant craves aver of the lease, in which there is a covenant on the part of the lessee to repair, except the premises shall be demolished by fire: and then pleads, that before Michaelmas 1725. the premises were burnt down against his will, and that they were not rebuilt by the plaintiff during the whole year for which the rent is demanded,

Where there is a covenant to pay rent, an action lies, though the house is burnt down.
L. Raym. 1477.
S. C.

manded, nor had he any enjoyment of the premises; and therefore prays judgment, if he shall be charged with the rent,

3 Barr. 1638,
1640.

To this the plaintiff demurred, and it was insisted on by Mr. Fozakerley, that whatever may be the default of the plaintiff in not repairing, yet the defendant must in all events perform his covenant to pay the rent; and *All. 27.* was cited for that purpose.

Strange contra insisted, that this was like the case of a covenant to repair, which will not bind in the case of a tempest, which is the act of God; and *a fortiori* in this case, which is the neglect of him who is suing for the rent. 1 *Co.* 98. *a. Hard.* 387. 1 *Roll. Abr.* 454. *pl.* 8. And he compared this to the case of an eviction, *Perk.* § 825, 828. 2 *Vent.* 67. and to the case in 1 *Roll. Abr.* 236. where it is held, that if part of the land is drowned by the sea, the rent shall be apportioned.

Sed per curiam, The case in *Allen 27.* is express to the contrary: if the defendant has any injury, he will have his remedy; but he cannot set it off against the demand for rent. The plaintiff must have judgment(1).

(1) *Belfour v. Weston*, 1 Term *ib.* 312. *Doe v. Sandbam*, *ib.* Rep. 310. S. P. *Vide Pindar v. 705. Cutler v. Powell 6 T. Rep. 710*
Ainsley, Sitting West. Mich. 1767. L. Kenyon as to a case in another sig.
of this last case.

Dominus Rex vers. Commissioners of Sewers in Essex.

Tarda a good return to mandamus.

L. Raym. 1479.

TO a *mandamus* to make a rate to reimburse an expensor; they returned, that the writ was not delivered 12 February, and that the commission expired in four days after and therefore they had not time. And the court allowed the return, saying they could not grant a peremptory *mandamus*, it appearing there was now no power in any body to execute it (1).

(1) According to the report in Lord Raym. the commissioners also returned, that they had made a rate prior to the issuing of the

writ, which when collected would be sufficient and applicable to repay him.

Warneford *vers.* Warneford.

In Middlesex coram Raymond C. J.

ON an issue directed out of Chancery, *devisavit vel non*, the Chief Justice ruled, that sealing a will is a signing within the statute of frauds and perjuries (1), 3 Lev. 1. *Strange pro quer.*

(1) *Sed querè*, for sealing was *Evans*, 1 Wils. 313. and see said not to be so in *Smith v. Gryle v. Gryle*, 2 Atk. 182.

Davers *vers.* Davers. In Canc.

A Motion was made, to inspect the exhibits proved in the cause before hearing; but there being no instance of any such order, the Chancellor would do nothing in it (1).

No inspecting exhibits before hearing.
2 Wils. Rep. 410.
2 Eq. Caf. Abr. 285. pl. 3. S. C.

(1) *Hodson v. Earl of Warrington*, 3 P. Wms. 34. S. P.

Trinity Term

13 Georgii Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*

Sir John Fortescue Aland, *Knt.*

James Reynolds, *Esq;*

Sir Edmund Probyn, *Knt.*

} *Justices.*

Sir Philip Yorke, *Knt. Attorney General.*

Charles Talbot, *Esq; Solicitor General.*

Merryfield *vers.* Berrey.

No second *certiorari* to reverse a judgment.

THE plaintiff in error took out a *certiorari* of a wrong term, which did not verify his error; and now he moved for a second *certiorari*, which was denied; the court saying, it may be granted to affirm, but not to reverse a judgment (1).

(1) *Vide* Carlton v. Mortagh, 1 Show. 214. Bowers v. Mann, Salk. 269. and the cases there post. 819. Berkley v. Howard, cited, rep. also 6 Mod. 113, 116. post. 907. Franklyn v. Reeves Holt, 275. Price v. Harlson, ante. 119.

Hicks *vers.* Jones.

In *scire facias* 15 days with *teste* and return are good.

A *Scire facias* was *teste* 15 May, returnable the 29th, which is making both the *teste* and return inclusive of the fifteen days. And upon consideration, it was held well, and that there

was no difference whether the proceeding was by bill or by original (1). *Salk. 599. Sir T. Jones 228.*

(1) That is as to the teste and return being inclusive. This was a suit by original, if it had been by bill it would have been sufficient, if there had been 15 days between the teste of the first *scire facias* and return of the second. *Elliot v. Smith, post. 1139.*

Dominus Rex vers. Johannem Oneby.

[766]

UPON an indictment for the murder of Mr. *William Gower*, found at the *Old Bailey* in *February* sessions 12 Geo. the defendant being arraigned, pleaded Not guilty; and upon the trial the jury found this special verdict.

It lies upon the slayer to extenuate the fact of killing, which *prima facie* is always murder.

If *A.* and *B.* have a sudden quarrel, and blows pass, and then there appears a sufficient time for the parties to have cooled, and afterwards *A.* kills *B.* it is murder.

It is the province of the Judge from the circumstances of the case to determine what is malice, and whether the killer had a sufficient time to cool.

If *A.* says he will revenge himself of *B.* or that he will have his blood, this is express malice against *B.* and if a killing ensues, it is murder. *Ld. Raym. 1485. 1 Barnard. B. R. 17. 9 St. Tr. 14. S. Q.*

In capital cases it is not necessary that the joinder of issue should appear upon the record (1).

That upon the second day of *February* 1725, the prisoner and the deceased were in company, together with *John Rich, Thomas Hawkins* and *Michael Blount*, in a room at the *Castle Tavern* in the county of *Middlesex*, in a friendly manner. That after they had continued thus for two hours, box and dice were called for; the drawer said, he had dice but no box, and thereupon the prisoner bid the drawer bring the pepper-box, which he immediately did: and then the company began to play at hazard, and after they had played some time, the said *Rich* asked if any one would set him three half crowns? whereupon the deceased, in a jocular manner, laid down three half-penny pieces, and then said to the said *Rich*, I have set you three half crowns, and the prisoner at the same time set the said *Rich* three half crowns, which the said *Rich* won: and immediately after the prisoner in an angry manner, turned about to the deceased, and said it was an impertinent thing to set halfpence, and that the deceased was an impertinent puppy for so doing, to which the deceased answered, whoever called him so was a rascal. That thereupon the said *John Oneby* took up a bottle, and with great force threw it *erga prædictum Willielmum Gower*, which bottle did

(1) *Rex v. Royce, 4 Burr. 2084, 286, 287. 2 Hawk. P. C. c. 38. 2085. S. P. Trem. Ent. 286, sect. 3. p. 563. 287. Purchase's case, 8 St. Tri.*

not hit the said *Gower*, but brushed his perriwig as it passed by his head, and beat out some of the powder, whereupon the deceased immediately after tossed a candlestick or bottle *erga prædictum Johannem Oneby*, but did not hit him with the same: upon which the deceased and the prisoner both rose up to fetch their swords, which then hung up in the room, and the deceased drew his sword; but the prisoner was prevented from drawing his by the company, and the deceased thereupon threw away his sword, and the company interposing, they sat down again for the space of an hour. That at the expiration of an hour, the deceased said to the prisoner, *We have had hot words, but you was the aggressor, but I think we may pass it over*; and at the same time offered his hand to the said *John Oneby*: to which the said *John Oneby* answered, *No, damn you, I will have your blood*. They further find, that afterwards the reckoning was paid by the deceased, the prisoner, *Rich, Hawkins and Blount*; and all the company, except the prisoner, went out of the room to go home; and the prisoner remaining alone in the room, called to the deceased in these words, *Young man, come back, I have something to say to you*; whereupon the deceased returned into the room, and immediately the door was flung to and shut, and thereby the rest of the company were excluded; and then a clashing of swords was heard, and the prisoner, with his sword, gave the deceased the mortal wound mentioned in the indictment, by which he died the next day. They further find, that at the breaking up of the company the prisoner had his great coat thrown over his shoulders, and that he received three slight wounds in the engagement; and that the deceased being asked upon his death-bed, whether he received his wound in a manner, amongst swordsmen called fair, answered, *I think I did*. That from the time of throwing the bottle there was no reconciliation between the prisoner and the deceased. And whether this be murder or manslaughter the jury pray the advice of the court, and find accordingly.

Upon which verdict a *certiorari pro rege* was brought, and the prisoner being at the bar, it was made a *concilium*, the court being of opinion it could not be made a *concilium* in his absence. And in *Hilary term 13 Geo.* it was argued by Serjeant *Darnall* for the king, and Serjeant *Eyre* for the defendant.

Serjeant *Darnall pro rege*. In order to consider whether this be murder or manslaughter I shall premise that which is not to be disputed, that every malicious killing is murder, and that malice may be either express or implied. This is malice implied in the act itself, because there was no reasonable provocation; there was nothing but words passed between them, till the prisoner

prisoner threw the bottle at the deceased; and it has been often resolved, that in point of law words are no provocation. But if words were a sufficient provocation, yet it appears the prisoner began with words, as well as acts. The calling Mr. *Gower* an impertinent puppy, was previous to the saying or doing of any thing by Mr. *Gower*, that could give offence to the prisoner: if the setting of half-pence was a thing to be resented, the affront was to Mr. *Rich*, and not to Mr. *Oneby*, whose bet to *Rich* was not at all affected by what was done by Mr. *Gower*. And that it is murder in this defendant, I think cannot be disputed after the judgment of the court in *Mawgridge's* case, which is in *Kelynge* 119. There the bottle thrown by *Cope* hit *Mawgridge* and broke his head: here, the candlestick or bottle tossed by *Gower* did not hit the prisoner at the bar: that was a sudden conflict, this a deliberate act, after a disposition to peace manifested by *Gower*, and a continuance of malice in the prisoner for above an hour after the first conflict. What was done here by Mr. *Gower* would have been justifiable in him, even if the candlestick had hit the prisoner; and so it was resolved in *Mawgridge's* case, for where the bottle returned by Mr. *Cope* did hit the defendant and broke his head. And as the act done by Mr. *Gower* was justifiable in him; it follows, that it can be no foundation to excuse or mitigate the subsequent killing by Mr. *Oneby*. The case put in *Kelynge* 128. of an assault by *A.* upon *B.* *B.* draws his sword and pursues *A.* to the wall, where *A.* in his own defence kills *B.* and it is held murder in *A.* has many strong circumstances in favour of *A.* which are not in this case.

[768]

But I apprehend, it is not necessary to rely barely on this point, that there is malice implied in the act; since it plainly appears upon the state of the case, that here is express malice: when the deceased was desirous to end the matter amicably, the prisoner replies, *No, damn you, I will have your blood*: this explains and goes through the whole fact, and proves the subsequent killing to be malicious.

I do therefore insist that taking it either way, either as a killing out of malice implied, or malice express, it is murder; and that this upon the fact is a killing of malice implied, and upon the prisoner's own words coupled with the fact, it is malice express, and consequently murder.

Serjeant *Eyre pro def.* The question is, what degree of homicide this is; and I apprehend it to be but manslaughter: the distinction is, that if the killing be of malice forethought, it is murder; if on a sudden occasion, it is but manslaughter; and that I take to be this case.

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Serjeant Eyre *pro def.* The question is, what degree of homicide this is; and I apprehend it to be but manslaughter: the distinction is, that if the killing be of malice forethought, it is murder; if on a sudden occasion, it is but manslaughter; and that I take to be this case.

In 3 *Inst.* 51. malice prepenſed is defined to be, when one compaſſeth to kill another, and doth it *ſedato animo*: on the other hand, manſlaughter is the doing it without premeditation upon a ſudden brawl, ſhuffling or contention. 3 *Inst.* 57.

The law has ever been indulgent to the paſſions of men: *ira furor brevis eſt*, and therefore as a madman the party is excuſed for what he does in a ſudden tranſport of paſſion: I do admit, that bare words are no provocation; but yet they will ſerve to explain the nature of the combat, and ſhew whether it was ſudden or not. The calling the priſoner a rascal, was what no man of honour could put up; and as this was the beginning of the quarrel, the fighting was as ſudden as the reproachful words. If the priſoner had ſtabbed Mr. Gower upon ſpeaking the words, and Gower had done nothing; I believe it would have been murder; but here was a regular fight, an interchange of blows, and ſo it comes up to the caſe put in *Kelynge* 55. of a combat between two of a ſudden heat, where if one kills the other, it is but manſlaughter.

[769]

The law has fixed no certain time when it ſhall be preſumed the paſſions of men are cooled. The caſe in 12 *Co.* 86. muſt take up a longer time than this, for there the boy ran three quarters of a mile to his father, and told his ſtory, and after that the father provided himſelf with a cudgel, and had as far to go in purſuit of the other boy: and there is this difference between that caſe, and the caſe at bar; that there the adverſary was out of fight, but here he continued in preſence, which muſt rather inflame than abate the paſſion.

The words made uſe of by Mr. Gower carry an imputation on Mr. Oneby, which might provoke him aſreſh; the telling him *was the aggreſſor* was not likely to make an end of the quarrel; and that is plain from the manner in which Mr. Oneby underſtood them, who would have never ſaid ſo harſh a thing to his friend Mr. Gower, if he had been at that time in any degree maſter of himſelf.

It is not found by the verdict, who began, after Mr. Gower returned into the room. It is not likely the priſoner began, becauſe he had his great coat thrown over his ſhoulders; and to the ſhutting the door, it is ſtated to be done immediately on Gower's returning, and is likelier to be done by him that came into the room when the firſt conflict happened. It appears Mr. Gower was the readieſt to draw his ſword, it was actually drawn, and the priſoner's was not; and ſince it is not ſtated

who drew first the second time, I think it ought to be explained by the first.

To make it murder in the first instance, it must be done with a weapon that would endanger life: the bottle in *Mawgridge's* case was full of wine, and it hit him so violently that he never spake more: but for any thing appearing upon the verdict, this might be only a small oil bottle usually set upon tables in public houses, and might perhaps be empty before it was flung. The case of *Mr. Turner*, which is taken notice of in *Cumb. 407*. was held manslaughter upon this reason, because the clog was not such an instrument, from a blow with which it was likely death should ensue. But supposing the bottle to be as big and as full as *Mawgridge's* bottle, yet no harm was done by it here, as there was in *Mawgridge's* case. Here was no drawing the sword *eo instante*, as *Mawgridge* did, which occasioned the Judges to lay the returning the bottle by *Mr. Cope* out of the case, and construe the immediate drawing the sword, as an intent to supply the mischief, which the bottle might fall short of. *Mawgridge's* case is materially different from this. There the intention from the first throwing the bottle was to commit murder, here it was otherwise. There the first bottle hit, here it missed. There the murderous intent was immediately carried into execution, here was a long interruption: The deceased needed not have returned, if he had not been equally disposed to combat; and he himself said it was a fair combat, which there was no pretence to say in *Mawgridge's* case.

[770]

Serjeant *Darnall* replied. The words on both sides must certainly be laid out of the case; if not, *puppy* was worse than *scal*, because it is the name of a beast. If *Mr. Gower* took *meby* to be the aggressor, the condescension was the greater in him; it is no more than saying, I who have been injured am ready to pass it by. I do not find it was at all relied upon in *Mawgridge's* case, that the bottle was full: and as to the case of *Cumberbach*, the servant there had committed a fault, for which he was liable to be corrected: the deceased's declaration is only that he received the wound by a fair push.

The court said nothing upon this argument, but appointed another to be before all the Judges of *England*. And in *Easter* term following it was accordingly argued by *Mr. Lee* for the King, and *Mr. Ketelbey* for the prisoner, to the same effect as the former argument. The prisoner not being present in *Serjeant's-Inn*, as he was in court upon the first argument, (this last being only to have the advice of the other Judges.)

And 12 June following, the prisoner being brought to the King's Bench bar, *Raymond C. J.* delivered the resolution of the court.

There has been a great deal of time since the trial of the prisoner, but that has not been spent on account of any difficulty in the case, but by the parties themselves, in drawing up and settling the special verdict: it did not come before us till *Hilary* term last, since which we have heard two arguments, and are now ready to deliver our opinions.

And I do now deliver it as the unanimous opinion of all the twelve Judges, that the prisoner at the bar is guilty of murder.

(a) 1 H. H. P.
C. 430.

[771]

The notion of murder is agreed on all hands to be, the killing another of malice prepense, that is in other words, a killing with a wicked design. The malice necessary to make the act murder, may be either express or implied; and my Lord *Hale* in his *Pleas of the Crown* (a), when he is describing what is malice implied, lays a great stress upon the manner of doing the act; and therefore puts the case of a man exercising an unruly horse amongst a multitude, where from the circumstances of the act it is highly probable a mischief may ensue.

○ If a man kills another without any provocation, this is malice implied; for the law supposes there must be some latent malice in the party, or otherwise he would not be so barbarous as to take away the life of another. It may be murder, though words, or even blows pass between them; and the case put in *Kelynge*, and cited at the bar, is certainly law; that if *A.* strikes *B.* *B.* draws and returns the assault, and *A.* kills *B.* it is murder, though *A.* was upon his defence, and though the killing was ever so sudden; and upon this principle it was, that *Mawgridge's* case was adjudged.

It was said, that *Mawgridge's* case was a single case, and went farther than any case before it; but I take this opportunity to declare, that we are all of opinion that *Mawgridge's* case is law.

But as that case was adjudged murder upon the implied malice, we are all of opinion the case at bar goes farther, and that the prisoner is guilty of murder on express malice.

A general malice against any man is express malice with regard to that man. *Mo.* 86. If one man says he will revenge himself of another, (or as in this case) that he will have his blood

blood, and a killing ensues; it is murder. Here is express malice before the giving the wound. There was nothing done by the deceased but what was perfectly innocent: he set the half-pence to *Rich*, and not to the defendant; *Rich* did not resent it, because it was not done with a design to affront him, but in a jocular way, and could be no foundation for the prisoner to turn about in an angry manner and abuse him. The words returned by *Mr. Gower* were not unsuitable to the occasion; though if they had been ever so improper, it is certain they would have been no provocation in law. And as to their being looked upon otherwise amongst those who esteem themselves your men of honour, give me leave to say, those are mistaken notions of honour, nothing being consistent with honour that is inconsistent with the laws of God or man.

The next thing that followed after the words, was the throwing the bottle at *Mr. Gower magna cum vi*, as it is stated in the verdict. The bottle it is true only touched his perriwig; but suppose it had killed him, will any man offer to say it would not have been murder? What *Mr. Gower* did is not stated to be such an act of violence as the prisoner's, which is found to be done with great force.

It was said that *Mr. Gower* was the first that drew his sword, but with what intent appears very plainly: it was not to attack *Mr. Oneby* but to defend himself; and therefore when he saw *Oneby's* sword secured, he immediately threw away his own.

[772]

After this they sit down again, and *Mr. Gower* like a man of temper applies to the other in a very proper manner: it was objected, that he thereby made *Mr. Oneby* to be the aggressor: if he did so, he said no more than the truth, for *Oneby* began first both by abusive language and by throwing of the bottle. And it is plain that *Mr. Gower* did not design to upbraid *Mr. Oneby*, but only used it as an argument to make up the matter.

The answer that is made to this is the strongest evidence of express malice. It can admit of no other construction, but that he was determined to take away the other's life.

The calling him back after he was gone out of the room, and telling him *he had something to say to him*, shews a sedate mind, and a deliberate intention. The words *young man* were words of contempt, and the *something he had to say to him* could be nothing but resentment. He staid in the room after all the rest, to have this opportunity of gratifying his revenge, and that *something he had to say to him* is explained by the clashing of swords which

was heard immediately upon the other's return, and the shutting of the door, when he had that fatal opportunity of carrying his malicious expressions into execution.

It is true that he received three slight wounds in the engagement. But we think in a case of this nature, that an interchange of wounds will not alter the case.

These are the reasons why we are all of opinion, that the killing of Mr. *Gower* was of express malice in the prisoner.

I shall now give answers to the objections which were made on behalf of the prisoner, and which have been duly weighed and considered by the Judges.

It was objected, that this was no more than a sudden quarrel, where there were provoking words and mutual assaults; that it does not appear the passions were ever cooled, and that indeed the law has fixed no time wherein it shall be presumed the heat and fury of the party may be allayed, but it is to be left to a jury, and they have found there was no reconciliation.

[773] To this it may be answered in the first place, that there can be no presumption in favour of death. *Kelynge* 27. And therefore in all cases, it lies upon the slayer, to extenuate the fact, which *prima facie* is always murder.

In the next place I would observe, that it is going much too far, to say that this killing was upon a sudden quarrel; but to take the objection in its full strength, I will suppose it to be so, and then the answer I give to it is, that it manifestly appears there was a sufficient time wherein the prisoner might have cooled, and reason have resumed her seat, because the subsequent acts appear to be deliberate.

In cases of this nature the Judges are to determine what is malice, or what is a reasonable time to cool; and they must do it upon the circumstances of the case: the jury are judges only of the fact, and we must determine whether it be deliberate or not (2). Hence it is, that in summing up an evidence the Judges direct the jury, if you believe such a fact, it is so; if not, it is otherwise; and they find either a general or a special

(2) In *Rex v. Higgins*, *post*. *Introd. to Discourse 2. Of Homicide* 886. *Rex v. Dean of St. Asaph*, *vide p. 255.*
3 *Term Rep.* 428. n. (a). *Foff.*

verdict upon it. There is no instance where the jury ever find that the fact was done of malice, or that the party had or had not time to cool; but that must be left to the Judges upon the circumstances of the case. In *Holloway's* case it was left to the court to determine whether the tying the boy to the horse's tail was not a malicious act. So in the case of the two boys who had quarrelled, and the father ran after one of them and killed him, the court, and not the jury, determined whether it was malice or not. *Palm.* 545.

12 Rep. 87:
Cro. Jac. 296.
1 H. H. P. C.
453.
See Mr. J. Ff-
ter's remarks
upon this case in
his Discourse of
Homicide, sect.
2. p. 295.

As the law has fixed no time when the passions shall be said to cool, it must, and only can, be determined upon the circumstances of each particular case. If any deliberate act appears, the question is determined: the quarrelling in a morning, and deferring the fight till afternoon, is a deliberate act, that will make it murder. *Kelynge* 27. And the opinion of the Judges in the Lord *Morley's* case was, that if diversions intervene, or the parties fall into other discourses, (as they did here for the space of an hour) it will be murder. So in *Bromwich's* case, *Lev.* 180. the declining an immediate encounter, because of the disadvantage of his high heels, was held to be a deliberate act, that manifested a coolness: and the same has been held, where the parties have debated about the conveniency of place. *Kelynge* 56.

If *A.* says to *B.* I will give you a pot of ale to strike me, and *B.* strikes him, and immediately *A.* kills *B.* it is murder: for *A.* knew what he was about, and deliberated with himself how he might perpetrate the fact, and be at the same time (as he thought) within the protection of the law. *H. P. C.* 48.
Crompt. 49.

[774]

From all which cases it appears, that though the law of England is peculiarly favourable in making this distinction with regard to the passions of men, yet it must be such a passion as for the time deprives a man of the exercise of his reason; and wherever it has appeared that he had the exercise of his reason, he is out of the protection of the law, and has been held guilty of murder.

Here was a reasonable time to cool, and it is plain it had its operation: he was cool enough to discourse for an hour, he determined in his own mind upon deliberation what he would do; and he declared his intention in those bitter and deliberate expressions, *No, he would not pass it over, damn him, he would have his blood; the young man must come back, for he had something to say him.*

The

The interchange of blows, where there is malice, will make no alteration: it does not, indeed, appear who struck first upon his returning into the room; but it is sufficient, that the verdict finds no act inconsistent with the malicious declaration of the party; nor can the declaration of the party deceased avail in this case, for that goes only to his receiving a wound in a fair manner with regard to the nature of the combat.

This is by no means to be resembled to the case of Mr. *Turner*; for there was a provocation, and a blow given with a clog that women wear, and from whence it was not probable that death could ensue: and this appears to be the material ground of the judgment in that case, by opposing it to *Gray's* case, who was held guilty of murder, because the stroke was given with a bar of iron.

The very minute differences observed between this and *Mawgridge's* case are no way considerable; since we are of opinion, that here is express malice, and there it was only implied; nor that I would have it imagined, we think this case materially different from *Mawgridge's*; on the contrary, I desire it may be taken notice of, that we declare otherwise, though we adjudge this case principally upon the malice expressed.

Upon the whole, this court, with the concurrent opinion of all the other Judges, do hold, that the prisoner at the bar is guilty of the murder of *William Gower*.

[775] But in justice to the prisoner we must give him four days to move in arrest of judgment, and therefore let him be brought up on this day seven-night.

And on *Monday* 19th *June* he was brought up, and objected, that there was no joinder of issue for want of a *similiter*: but the precedents in all capital cases being in this manner, the objection was over-ruled. And Mr. Justice *Fortescue*, in a very serious speech, pronounced the sentence for his execution: which was appointed for *Monday* 3d *July*. Upon the morning whereof he opened a vein, and bled to death, to avoid the infamy of an execution.

Blake *vers.* Dodemead & ux.

ERROR *e C. B.* in a *scire facias* brought by husband and wife on a judgment recovered by her, *dum sola*, and the *scire facias* alleges, *quod post redditionem judicii predicti predicta Sara cepit in virum præd' Johannem Dodemead. Dem' inde, et pro causa*, no venue where the plaintiffs were married. And it was insisted on error by Serjeant *Harwkins*, that there must be a venue as to every fact necessarily alleged to intitle the plaintiff to recover, and here the marriage is the only foundation for the man's joining in this *scire facias*. *Thes. Br.* 251, 256. *Ow.* 23. 2 *Lev.* 227. *Mo.* 527.

On a *scire facias* by *baron* and *feme* upon a judgment recovered by the *feme, dum sola*, the plaintiffs need not allege their marriage with a venue. *L. Raym.* 1504. 1 *Barn. B. R.* 16. *S. C.*

Reeve contra. This is only a surmise, to which no venue is necessary. If *alien nec* be pleaded in abatement, a venue is not necessary. *Salk.* 6. This concerns the person only, and therefore is triable where the action is brought. Besides, the precedents are many of them in this manner. *Thes. Br.* 265. *Off. Br.* 259, 283, 322, 253, 259, 262, 297. 314, 321. *Clift.* 681. In debt upon a bond by husband and wife it is never alleged.

Ante 9.

At another day *Lee* for the plaintiff in error cited 35 *Hen.* 6. 50. 2 *Leon.* 75. *Co. Ent.* 623. that where it does not come in by supposal, but is positively alleged, there must be a venue.

He objected likewise, that there was a discontinuance. The demurrer is *quod narratio minus sufficiens in lege existit ad actionem manutenend'*, and the joinder is, *quod breve bonum et sufficiens existit ad execution'*, &c. which is putting in judgment of the court a matter not insisted upon by the demurrer. *Salk.* 218.

Upon a *scire facias*, if defendant demurs alleging that the declaration is insufficient, a joinder that the writ is sufficient is no discontinuance.

Strange contra. In answer to the first objection cited more precedents, *Brevia judicialia* 204, 238, 240, 252, 253, 258, 256. where it is alleged, without any venue, that the plaintiff was made a knight. *Rast.* 167. a. On a *scire facias ad cognoscendum relaxationem*, no venue where the release made. *Rast.* 73. *Reg. Jud.* 43.

[776]

As to the second exception, it would have been wrong, if we had followed the defendant's demurrer. There is no such thing as a declaration on a *scire facias*, the plea is to the writ, and *narratio* and *breve* in this case are the same. The case in *Salkeld* was a demurrer in bar to a plea in abatement, which was going off from the matter of abatement to the merits of the cause; whereas here the single point always in view is, whether the plaintiffs

If the joinder had been otherwise it would have been a discontinuance.

tiffs shall have execution or not. *Et per curiam*, If the joinder had been otherwise it would have been a discontinuance: the declaration and writ are synonymous, and the demurrer being wrong, the plaintiff could not demur to it; and as to the first objection, there being precedents this way, we think it well enough without a *venue*.

Townsend *vers.* Thorpe.

Parish clerk is a spiritual officer, and may be there deprived. *L. Raym.* 1507. *Vide Mich.* 6 Geo. 2. *Peak v. Bourne*, this opinion questioned, *post.* 942 (1).

THE plaintiff declared in prohibition, that he was indicted for an assault with intent to commit Sodomy, notwithstanding which he was proceeded against in the spiritual court for the same offence, and for drunkenness. The defendant pleaded, that the plaintiff was a parish clerk, and that the suit there was not only to punish him for the incontinency, but also to deprive him of his office. *Demurrer inde.* And in *Michaelmas* term last, as it was going to be argued, the court proposed to stay till the indictment was tried: and it having been tried, and the defendant convicted, and pillored; the court, without ordering the declaration to be amended, granted a consultation *quoad* the proceeding to deprive, and confirmed the prohibition as to any other punishment. They said he was an ecclesiastical officer as to every thing but his election. *Salk.* 536. *Mar.* 101. *Salk.* 550.

(1) And over-ruled, *Pitts v. Evans*, *post.* 1108. *Tarrant v. Haxby*, 1 *Burr.* 367.

Patterfon *vers.* Scott.

Debt lies for rent where the deed was made, or land lies. 1 *Com. Dig.* Action. (N. 4) (N. 6.) 161. (N. 11.) 167.

DEBT for rent on indenture laid to be made at *London*, for the demise of lands in *Surrey*. The action was laid in *London*; and on demurrer, it was held, that the plaintiff had his election to bring it in either, against the lessee; otherwise had it been against an assignee, who is chargeable only on the privity of estate (1). Judgment *pro quer*.

(1) *Barker v. Damer*, 3 *Mod.* 388. S. P. So also if brought by the assignee of the lessor. *Thurby v. Plant*, 1 *Sand.* 237. 1 *Lev.* 259, S. C. *Thrale v. Cornwall*, 1 *Wils.* 165. But otherwise where he can bring covenant, *ib.*

Thompson *vers.* Hodgson.

AN executor libelled in the spiritual court for taking a tankard without his consent, on pretence that the testator gave it the defendant if he died of his then sickness. And the court granted a prohibition, this not being a legacy, but a *donatio causa mortis*, the validity whereof may be tried in an action of trover.

Donatio causa mortis not issuable in spiritual court. *Vide* 1 P. Wms. 441. Sel. Cas. in Chan. 14.

Duke of Rutland *vers.* Batty.

AN action was brought on a *South-sea* contract in these words: "I promise to pay to the Duke of Rutland 10,000 *l.* upon his transferring to me or my order 1000 *l.* capital *South-sea* stock some time on or before the shutting of the company's books for the next *Christmas* dividend."

The tender of stock must be at the last part of the day that it can be accepted.

The tender and transfer were made at one: but it being the day of shutting the books, there was more business than could be transacted in the morning, and therefore the books were opened in the afternoon, and several transfers were made. Upon the trial of this cause the jury found for the plaintiff. But a new trial was granted, because after the transfer was vacated at one, the defendant might have come and accepted the stock: and though the general rule of law, that tenders must be at the last instant of time, has been broke in upon, and made to relate to the last part of the day whereon in these cases the act can be done; yet that is only out of necessity, of which there was none in this case (1).

Mich. 2. Geo. 2. it was tried at the bar, and the court being of the same opinion, the plaintiff suffered a nonsuit (a).

(a) 1 Barnard. B. R. 95.

(1) *Lancashire v. Killingworth*, 1 *Ld. Raym.* 686. *et vide ante* 504, 533, 458, 579, 832.

Woadson *vers.* Nawton.

TRESPASS for taking and dispersing a load of fern ashes: the defendant pleaded, that he was an occupier of land in *A.* the tenants whereof had right of common and cutting fern on the *locus in quo*; and that the plaintiff wrongfully came and cut fern and burnt it whereupon the defendant came and scattered it about, *prout ei bene licuit*. *Demurrer inde*; and

Commoner cannot justify dispersing fern ashes burnt by a stranger.

Strange

Strange pro def cited 1 Roll. Abr. 405. pl. 5. that a commoner may justify taking the cattle of a stranger damage feasant, or abate hedges. 9 Co. 112. b. 2 Mod. 65. And the difference is, where it is the act of the lord, and the act of a stranger. Lutw. 1240. Sti. 428.

Sed tota curia contra. For if the plaintiff did him any damage, he has his action; but after the plaintiff had burnt the fern, and thereby converted it to his own use; the commoner has no right to come and disperse it. *Judicium pro quer*.

Warren *vers.* Confett.

Intr. Hil. 8 Geo. rot. 47.

Debt on a specialty for not accepting and paying for stock.

Nil debet is no plea.

L. Raym. 1500.

1 Barnard. B. R.

15.

8 Mod. 106,

323, 382. S. C.

DE B T on a specialty for the penalty, for not accepting and paying for stock according to a contract. And the plaintiff avers performance of every thing on his part to intitle him to the action: the defendant pleads *nil debet*, to which the plaintiff demurs, and judgment is given in *C. B. pro quer*, and error brought in *B. R.*

Wearg, In maintenance of the judgment said, it had been often determined, that *nil debet* is not pleadable, where the action is founded upon the specialty: and the reason is, because the defendant may either rely upon it, that it is his deed, and he has performed it; or it is not his deed, and he is not bound to perform it: whereas *nil debet* (if it should be allowed) will give him the opportunity of meeting the plaintiff both ways.

Raby contra. Where the plaintiff, in order to maintain his action, must necessarily aver a matter *in pais*, (as in this case he must a readiness on his part) *nil debet* is pleadable. *Salk.* 234. 565. 10 H. 7. 24. 6 Mod. 127.

Eyre J. thought the plea might be maintained on that distinction, *sed ceteri contra.* *Adjournatur.* And

Mich. 9 Geo. Serjeant *Whitaker pro quer* in errore argued, that *nil debet* is pleadable in this case; because the plaintiff must aver several matters of fact, to intitle him to the action, in relation to his own readiness, and the defendant's default. 5 Co. 4. 21 H. 7. 14. *Keilw.* 153. b. In account before auditors *nil debet* may be pleaded. 49 E. 3. 8 H. 6. 5. b. So where the assignee of commissioners of bankruptcy brings an action, he must aver several matters of fact, which he must prove upon *nil debet*.

Wearg contra. This action is for the penalty, and the reason why *nil debet* is not allowed is, because the action is founded on a solemn thing as the deed of the party; and the court will not suffer a man to plead other matter, till he has admitted it to be his deed; and the party has his election, either to confess and avoid or deny, whereas this issue involves them all. The case of a penal statute is not founded on the deed of the party: and that of an arbitrement, or an account, may have no writing in it. *Curia advisare vult.* And afterwards in *Michaelmas* term 13 Geo. Sir Robert Raymond coming into court before judgment was given; it was argued a third time by Mr. Reeve and Serjeant Darnall.

Reeve pro querente in errore. The plaintiff below hath specially signed it for cause of demurrer, that the general issue is not pleadable in this case. It must be admitted, that the plaintiff could not maintain debt, without shewing the articles, and a breach, to intitle him to the penalty: and that differs it from the case of a bond with a condition, where the condition being for the benefit of the defendant, he must shew a performance of it, and shall not plead *nil debet*. Here matter *en fait*, and in fact, are mixed; and it does not come within the reason of an obligation, where *prima facie* the defendant is estopped to say there is no debt; upon which difference all the cases have gone. 21 H. 14. *Bro. Issue join.* 23. 2 *Keb.* 347. 11 H. 7. 4. b. 45 E. 4. b. 46 E. 3. 1. b. 1 *Saund.* 38. *Cro. Car.* 513. *Hutt.* 109. *Hob.* 244. 3 *Lev.* 170. In the case of *Barras v. Andrews*, Mich. 2 Ann. Holt C. J. held, that in debt against an administrator, suggesting a *devastavit*, *nil debet* was pleadable, and there matter in fact and matter of record are both joined.

Serjeant Darnall *contra.* I agree, where the action is founded on matter intirely *dehors* the deed, *nil debet* is pleadable; such are escapes, *levy per distress*, entry and expulsion, which are the *git* of the action, and the judgment or deed is only used as an inducement: and so it is in actions for a penalty given by act of parliament. But this action is grounded intirely upon the deed, which is *quasi* a bond, and all the rest is in the nature of a condition. The breach here is assigned upon the deed. 2 *Saund.* 344. *Madr.* 332. *Salk.* 565. *Keilw.* 47.

If this plea be allowed, it will make it very difficult and expensive for a plaintiff to recover. He must look every way, and consider from how many quarters he is liable to be attacked. He must be prepared to prove the execution of the deed, the registry of the contract, the opening the books, a tender and refusal, before he can so much as put it upon the defendant to answer

swer him; and if he happens to get through all this, the defendant may surprize him, by giving in evidence *non compos*, duress, release, or many things of that nature : or if a plaintiff should be prepared to meet him in all those instances, yet it must be a pretty large debt that can make it worth his while to be at all that expence. These inconveniencies may be all avoided, by disallowing this plea ; and no inconvenience can follow to the defendant, since the act for the amendment of the law has given a liberty to plead several matters.

(a) Smith v.
Whitbread,
cited 2 L. Raym.
1503.

Curia advisare vult. And this term it was argued a fourth time by Mr. Fazakerley and Serjeant Chapple, who insisted on the common case of a bail bond (a) where it is not allowed to plead *nil debet* : which the court thought a case in point, and said that as this is a plea vastly most advantageous for a defendant, it would have been often attempted ; but that it was a general notion, it would not be allowed. The judgment of C. B. affirmed (1).

(1) *Hart v. Weston*, 5 Burr. 2586. 2 Black. 683. S. C. dec. acc.

Michaelmas Term

I Georgii 2. Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*
 Sir Francis Page, *Knt.*
 James Reynolds Esq.
 Sir Edmund Probyn, *Knt.*
 Sir Philip Yorke, *Knt. Attorney General.*
 Charles Talbot, *Esq; Solicitor General.*

} *Justices.*

Hunter vers. Sampson et al' manucapt. Yardley.

PARKER moved to stay proceedings against the bail, pending error by the principal, upon the terms it was done upon in *Myer v. Arthur*, ante 419. But it appearing here, that bail was not put in upon the writ of error, so as to make it an absolute *superfedeas*; the court refused it, saying they would not go one step farther than the case of *Myer v. Arthur*.

Will not stay proceedings against bail pending error till bail is put in upon the writ of error.

Holiday vers. Fletcher.

THE declaration ran thus: *A. H. queritur de P. F. administratore omnium et singulorum bonorum jurium et creditorum que fuerunt B. F. nuper viri sui defuncti qui obiit intestat', &c.* To which the defendant demurred, and shewed for cause, that there was no averment that administration was committed to the defendant, it being common towards the end of the declaration to say, *cui quidem P. F. administratio, &c. commissa fuit.* And Mr. *Wynne pro def'* cited *Cro. Jac.* 10. 1 *Sid.* 228. 2 *Vent.* 84. Vol. II.

In B. R. calling the defendant administrator in the declaration is sufficient, without a specialty averment. *L. Raym.* 1516. 1 *Barn. B. R.* 29. 2 *C.* *Litt.*

Litt. Rep. 80, *Sir T. Jones* 1. *Bro. Adm.* 11. *Praft.* 220. *Sed per curiam*, There is a material difference between declarations in this court, and in *C. B.* where the beginning of the declaration is only a recital of the writ, *A. B. summonitus fuit ad respondendum C. D.* whereas in *B. R.* it is *A. B. queritur de C. D.* Here it is sufficiently alleged, so as to be traversed; and the word *existente* must be understood. 9 *H.* 5, 6, 7. *Plou.* 192. 2 *Saund.* 61. *Judicium pro quer.*

Studley vers. Sturt.

Sunday not to be computed one of the four days for bail.
1 *Barnard. B. R.*
21. *S. C.*

THE writ was returnable on *Wednesday*, and the bail bond was assigned on the *Monday* following; and the court held the plaintiff was too soon by a day, for that *Sunday* was not to be reckoned, *ante* 86, *post.* 914.

Chambers vers. Robinson.

There cannot be special bail in a second action on a second judgment. And after defendant has two terms without being charged, he shall be discharged as to the first.

THE defendant after judgment surrendered himself in charge of his bail, and lay two terms without being charged in execution: during which time the plaintiff brought an action of debt upon the judgment, and after a recovery in that action the defendant lay two terms more, without being charged: and the plaintiff brought another action of debt upon the second judgment, whereupon the defendant moved for a *superfedeas* as to the two first actions, and that common bail might be accepted in the last. And upon consideration both were granted: it was agreed, that in the first action of debt on judgment special bail might be required (1), but the court said it would be a handle of oppression if they carried it any farther.

(1) *Wright v. Kerfwill, Barnes* 1039. *De La Cour v. Read,* 376. *Vide Hall v. Howes, post. Black.* 278.

Dominus Rex vers. Powell.

What does not abate by death of the King.
3 *Mod.* 165.
3 *Bro. Par. Ca.*
428. *S. C.* but not *S. P.*

IT was held that proceedings on an information in nature a *quo warranto* are not abated by the demise of the crown.

Wilson vers. Wilkinson.

Custom in paying tithe of wool by the pound and not by the fleece is no *modus*.

LIBEL in the spiritual court for tithe of wool: the defendant pleaded, that by ancient usage in the parish the tithe of wool was paid by the pound, and not by the fleece: and the

upon moved for a prohibition, as being a *modus*. But the court held this was not a *modus*, only a different manner of computing the *quantum*, wherein it is agreed that the tenth part is to be paid in all events. The prohibition was denied.

Earl of Aylesford's Case. In Canc.

THERE was a *parol* agreement for a lease of twenty-one years, upon which the lessee entered, and enjoyed for six years, and then the Earl brought a bill against him to oblige him to execute a counterpart for the residue of the term. The lessee pleaded the statute of frauds and perjuries, which on argument was over-ruled, the agreement being in part carried into execution (1).

Statute of frauds not pleadable where the agreement is executed in part.

(1) That equity will enforce the performance of a *parol* agreement carried partly into execution, notwithstanding the statute of frauds. *Vide* *Hollis v. Whiteing*, 1 Vern. 151. *Hollis v. Edwards*, ib. 159. *Butcher v. Stapely*, ib. 363. *Pyke v. Williams*, Vern. 455. *Foxcraft v. Lister*, 456. *Gilb. Eq. Rep.* 4 11. S. C. *Amas v. Bayley*, 2 Vern. 627. *Savage v. Foster*, 9 Mod. 37. *Lord Pengal v. Ross*, 2 Eq. Cas. Abr. 46. pl. 12. *Anon* 4 Geo. 1. *An. Abr. Tit. Contract*, (H.) Ca. 8. *anon. id. ib. Ca. 40. Locky* *Locky*, *Prec. in Chanc.* 519. *Seagoood v. Meale*, ib. 561. *ante*

426. *Clerk v. Wright*, 1 Atk. 12. *Lacon v. Mertins*, 3 Atk. 4. *Gunter v. Halscy*, Amb. 586. *Whaley v. Baginall*, 6 Bro. Par. Ca. 45. *Whitbread v. Brockburst*, 1 Bro. Chan. Cas. 404. It is said in *Smith v. Turner*, 2 Eq. Ca. Abr. 49. pl. 23. and *Seagoood v. Meale*, *Prec. in Chanc.* 564. That if the lessee had been put to no expence, a promise of a lease, though accompanied with possession, would not be sufficient to oblige the lessor to execute a lease. But in many of the cases above cited, it seems to have been held otherwise.

Dacosta and the Russia Company.

UPON a *mandamus* to admit him into the company, a side bar rule was obtained to return the writ; and upon motion in court that rule was set aside, because there ought to have been an affidavit of service of the writ: then a new rule was moved for, and opposed, because this not being a case within the *mandamus* act (a) the plaintiff ought to go the old way by *alias* and *pluries*. But the court held that not necessary, and made a rule on the company to return the writ in four days. *Strange* *societate*.

Practice on *mandamus*'s. *Fitzg.* 4. 1 Barnard. B. R. 24. S. C.

(a) 9 Ann. cap. 20.

Frescobaldi *vers.* Kinafton.

Where two join in a writ of error, and one will not assign errors, the court will give the other time to summon and sever.

Fitzg. 1.

1 Barnard. B. R.

4, 23. S. C.

[784]

Where there are two executors and one under age, they may sue, but cannot be sued by attorney. But one may appear by attorney and the other by guardian.

A Writ of error was brought by two executors, of a judgment against them, *ad grave damnum* of both. A *scire facias* was taken out, and a *scire feci* returned. And then one of the plaintiffs in error moved for time to assign errors, till there could be a summons and severance of the other; upon an affidavit that the other executor was in the interest of the defendant in error, and would not join. And time was given accordingly. And afterwards upon argument the case appeared to be thus:

Error of a judgment in C. B. in case upon several promises against two executors on a promise by their testator. They plead *quod ipsi non assumpserunt*. To which the plaintiff demurs, and for want of a joinder there is judgment by default, upon which a writ of inquiry issues, and damages are assessed with costs. Then there is a judgment for the damages *de bonis testatoris*; and as to the costs, *de bonis propriis*, they are remitted. Upon error in B. R. one executor only appears, and prays summons and severance of the other, upon which there is a judgment *quod sequatur solus*; and then he assigns for error, that he was an infant, and has appeared by attorney; and *in nullo est erratum* is pleaded.

Mich. 13 Geo. 1. Reeve pro quer' in errore argued, that in *nullo est erratum* had admitted the infancy, and therefore it was to be taken up as a point of law. I agree, if executors were plaintiffs, he of full age might make an attorney for both; but the distinction has always been, that where they are defendants, he cannot: for there if he mispleads, there are costs *de bonis propriis*, for which he must have an action against his guardian, which he cannot have against an attorney. Whereas when he is plaintiff, he pays no costs. 2 Cro. 420, 441. 1 Roll. Abr. 287.

Executors are considered as distinct persons, and therefore may sever in their pleas. 1 Roll. Abr. 229. And so it was done in the case of *Baldwin v. Church*, Hil. 2 Geo. in B. R. (a). The being joined with another of full age signifies nothing, for this is a personal privilege. 2 Saund. 212. 1 Lev. 299. Sti. 318.

(a) Ante 20.
10 Mod. 323.

Strange contra. In reason there is no difference between being plaintiffs or defendants. As he pays costs if a defendant, he is amerced *pro falso clamore* if a plaintiff. If a plaintiff, he may be barred of his demand, as well as have a final judgment against him.

him where he is defendant. Where there are two executors, they make but one representative of the testator, and the suit is in *auter droit*. *Cro. El.* 541. An infant sole executor sued by attorney, and held well, and the judgment affirmed. *Show.* 169. Two avow as bailiffs, and one being of age, it was held, that he might make an attorney for both; and *Holt C. J.* said it would be the same with the case of two executors, where one might make an attorney for both, as well as dispose of the whole estate. There is a necessity (says he) for all to join, and therefore one attorney shall serve for all.

But whatever might be the law in other cases, where the infant defendant is charged with costs; yet he can suffer no damage here, because the costs are remitted. 1 *Roll. Abr.* 784. pl. 5; 6. 1 *Co.* 162. 8 *Co.* 35.

Reeve replied. The case in *Cro. El.* 541. is denied in *Cro.* 420. And as to the case in *Show.*, it is within my admittance, for avowants are in the nature of plaintiffs.

[785]

C. J. This case requires great consideration. No case has been cited to make this good, where the infant is defendant. But the case in *Stiles* is in point to make it bad. Where they are plaintiffs, it is not to be doubted but all might appear by attorney. One executor it is true may make an absolute disposition of any part of the estate, but then it will be a *devastavit* in him only; whereas if they are defendants and do not make a good defence, it is a *devastavit* in all. Here it appears, a good defence was not made, for the attorney has pleaded a plea which could never bring the merits in question; and this being an action on simple contract, he may be prejudiced by not pleading debts upon specialty.

1 *Com. Dig.*
Tit. Admini-
stration.
(1. 1.) (1. 2.)
(1. 3.)

Fortescue J. I think this case stands upon a different foot from the case of an infant sole executor. For if one executor can dispose of the estate in spite of the other, why may not he do an act of a less nature in appointing an attorney for both, which is only giving a bare authority. Executors are but one person in the eye of the law; and it is absurd to say, the executor is of full age, and under age, at the same time. There is no reason given for the opinion in *Stiles*, and the cases in *Show.* and 2 *Saund.* are in vain: and if there be no real difference between being plaintiffs and defendants, (as I think there is not) then the later authorities are against the case in *Stiles*. If an infant executor brings trover upon a conversion in his own time, he pays costs, according to the case of *Baller v. Delander* (a); and I do not see why he may not be as liable to be hurt by a declaration or replication as well as by a plea.

(a) *Caf. Temp.*
Hard. 205.

Reynolds J. It will be pretty difficult to adjust the resolutions which have been cited on both sides, with the general reason of the law; where the general rule is, that no infant can appear by attorney (1). And that provision for his security will signify nothing, if another may make an attorney for him. If he was a sole executor defendant, it seems to be agreed that he could not appear by attorney; and the only point this is attempted to be supported upon is, that being joined with one of full age alters the case. Now if they were obliged to appear as one person, I should think it might be well; but it is certain they are not obliged to do so, for as they may sever in pleading, so one may appear by attorney, and the other by guardian; which shews that to many purposes they are not one person in the eye of the law. But I must own I cannot see the substantial difference between their being plaintiffs and defendants. And since it is admitted to be well in the case of plaintiffs, it goes a great way with me as to the other point.

[786.]

Probyn Justice, the law has always been jealous of putting an infant under the power of one who is not answerable to him, as a guardian is. There is this difference between their being plaintiffs and defendants; that as plaintiffs they cannot sever in declaring, which they may do in pleading as defendants.

After this argument it stood upon a *curia advisare vult*, till this term, when Sir *Francis Page* being come into Justice *Fortescue's* place, it was argued again upon his account; and upon the argument he and the Chief Justice were clearly of opinion, that the judgment was erroneous: and *Reynolds Justice* said, he had considered it more fully, and was of opinion he could not appear by attorney, though another was joined who could: and *Probyn Justice* concurring, the judgment of *C. B.* was reversed.

(1) *Power v. Jones*, ante 445.

Dominus Rex vers. Elliot.

B. R. cannot receive a fine set by inferior court (1).
1 Sess. Ca. p. 328. no. 262.
S. C. but a different point.

THE justices of a borough committed the defendant for non-payment of a fine set on him for a contempt in court. The defendant brought a *habeas corpus*, and the court held it a good commitment; upon which he offered to pay the fine in *B. R.* but they said they could not take it; he must be remanded, and pay it below.

(1) Neither can it set one where the justices have neglected
Rex v. Elwell, post. 796.

Smith *vers.* Fuller.

ERROR of a judgment in *C. B.* in case for scandalous words, of which four several setts were laid in the declaration. Upon Not guilty, the jury find for the plaintiff as to one set of words, and for the defendant as to all the rest; and there is a judgment for the plaintiff as to the damages and costs of suit.

Where the defendant is found Not guilty as to part, there must be a judgment for him as to that. But though error is brought, the record may be amended by the verdict.
Cited And. 386.
S. C.
1 Com. Dig. Amendment.
(R.) 473.

On error in *B. R.* it was objected by *Strange*, that there ought to be a judgment for the defendant as to the words of which he is acquitted, that he may plead the acquittal in bar of any other action. 1 *Roll. Abr.* 771. pl. 18, 20. 772. pl. 26. 1 *Roll. Rep.* 293. 1 *Keb.* 488. 2 *Saund.* 250. 1 *Saund.* 281. *Co.* 58. *Co. Ent.* 287, 304, 537, 676. and the plaintiff should be amerced *pro falso clamore* as to so much. In the case of *Tench v. Dalton*, *Pasch.* 3 *Geo.* 1. in ejectment there was (*inter alia*) a verdict for *Mountain*, and a release of that, and it was long debated, whether it was necessary to have judgment in that case for the defendant; but it was taken for granted that there must have been one, if there had been a verdict for him.

[787]

The court thought the judgment was not to be supported, but put it off on the importunity of the defendant in error, who then applied to *C. B.* and moved to amend the record by the verdict: and after a rule to shew cause, the record was amended, and a judgment added, that *quoad* the words of which the defendant was acquitted *eat inde fine die*, and the plaintiff in *misericordia*, &c. And then the King's Bench was moved to amend the record there, and afterwards the judgment was affirmed.

The Case of John Bennet, Esquire, one of the Masters of the High Court of Chancery.

HE was a ground landlord of a house, in which an under-lessee dwelt, against whom execution was sued out. The court was moved for a rule on the sheriff to pay Mr. Bennet a year's rent, pursuant to 8 *Ann. c.* 14. But it was held, that this was not a case within the statute, which extends only to the immediate landlord; and the case of *Carr v. Goldington* was mentioned to have been so adjudged.

Ground landlord cannot come in for rent on execution against an under-lessee.
8 *Ann. c.* 14.

White *vers.* Woodhouse.

in what action
cannot bring
money into
court (1).
1 Barnard. B. R.
25. S. C.

IN a special action upon the case for immoderately driving a chaise let to hire; the court refused to let the defendant bring money into court, and discharged a rule which had been obtained as of course for that purpose: and the Chief Justice said, the first motion to bring money into court was in *Keyling's* time, and introduced to avoid the hazard and difficulty of pleading a tender. *Strange pro quer'.*

(1) *Vide Hallet v. East India Company*, 2 Burr. 1120. as to the principle by which permitting the payment of money into court is regulated.

Turvil *vers.* Aynsworth.

Any variation in
the name of a
corporation is
fatal.
7 G. 1. ft. 2.
c. 1.
L. Raym. 1515.
S. C.
with two other
exceptions.

[788]

IN an action upon a *South-sea* contract, the plaintiff declared it was for stock in the company trading *ad maria Austral' vocat'* the *South-sea* company. It was insisted on at the trial, that *Australis* was the proper word, without an *i*, and therefore the evidence did not support the declaration: and it was agreed to take a verdict for the plaintiff, and to apply to the court: and after a great debate a new trial was granted; for it was a different corporation, and if the word *Austral'* was to be rejected, it would not do, for then it would be a company trading to all seas, whereas they trade in the *South Seas* only; and the *Anglia vocat'* the *South-sea* company, will not do, where there is a proper *Latin* word which is not made use of (1). *James Osborn's* case, 10 Co. 130.

The plaintiff afterwards had leave to amend his declaration upon payment of costs.

(1) Mr. Douglas in a note in a *quære* of the authority of his valuable reports to *Rex v. May*, n. 194. n. 253. makes a case, *et vide Williams v. Ogle*, p. 889.

Dominus Rex *vers.* Lister.

Indictment on
5 Eliz. quashed.
2 Sess. Ca. p.
227. no. 160.
10 Mod. 85.
1 Barnard. B. R.
30. S. C.

IN an indictment for exercising the trade of a *Salter* (which was held well, though not mentioned in the statute 5 Eliz. c. 4. 1. Lev. 243. 1 Sid. 367. 2 Keb. 582.) the stile of the King

King was *Magna Britannia*; and the trade laid to be exercised at the time of the statute *infra hoc regnum* must refer to *Magna Britannia*, whereas by the words of the statute it must be used in *England*; and for this fault the indictment was quashed. And so was a former indictment, *Rex v. Parish, Trin. 13 Geo. 1. (1).*

(1) *Rex v. Hoib, S. P. ante 552.*

Dominus Rex vers. Street.

AN order of bastardy was made, to pay so much weekly, till the child was nine years old, if it should so long live. *Et per cur.* It is a good order, for we cannot intend it able to provide for itself sooner (1).

Order to provide for bastard till nine, if it should so long live, good.

Cases of Sett. & Rem. p. 124.

no. 171. Shaw. P. L. 65. 1 Sess. Ca. p. 296. no. 233. 1 Barnard. B. R. 31. S. C.

(1) *Smith's case, 1 Bott by Conf. 434. pl. 584.*

Dominus Rex vers. Curl.

INFORMATION exhibited by the attorney general against the defendant *Edmond Curl*, for that he *existens homo iniquus sceleratus ac nequiter machinans et intendens bonos mores subditorum ejus regni corrumpere, et eos ad nequitiam inducere, quendam turpem iniquum et obscenum libellum intitulat' Venus in the cloister, or the Nun in her smock, impio et nequiter impressit et publicavit, ac imprimi et publicari causavit*, (setting out the several lewd passages,) *in malum exemplum &c.* And of this the defendant was found guilty. And in *Trinity* term last it was moved in arrest of judgment by Mr. *Marsh*, that however the defendant may be punishable for this in the spiritual court as an offence *contra bonos mores*, yet it can't be a libel for which he is punishable in the temporal court. *Libellus* is a diminutive of the word *Liber*, and is *libellus* from it's being a book, and not from the matter of it's contents. In the case *de libellis famosis* my Lord *Coke* says, that it must be against the publick, or some private person, to be a libel; and I don't remember ever to have heard this opinion contradicted. Whatever tends to corrupt the morals of the people, ought to be censured in the spiritual court, to which properly all such causes belong: what their proceedings are I am a stranger to; but for me 'tis sufficient to say, I don't find any case wherein they were ever prohibited in such a cause: in the reign of King *Charles the Second* there was a filthy run of obscene writings, for which we meet with no prosecution in the temporal

An obscene book is punishable as a libel. 1 Barnard. B. R. 29. 10 S. T. ap. 92. Fort. 100.

[789]

courts;

(a) Fort. 98.

courts; and since these were things not fit to go unpunished, it is to be supposed that my Lords the Bishops animadverted upon them in their courts. In the case of *The Queen v. Read* (a), 6 Ann. in B. R. there was an information for a libel in writing an obscene book called *The fifteen Pleagues of a Maidenhead*, and after conviction it was moved in arrest of judgment, that this was not punishable in the temporal courts; and the opinion of Chief Justice Holt was so strong with the objection, that the prosecutor never thought fit to stir it again.

Mr. Attorney General *contra*, I do not observe it is pretended there is any other way of punishing the defendant; for if the spiritual court had done it, instances might be given; and it is no argument to say we meet with no prohibitions; such a way of arguing would construe them into all sorts of jurisdictions.

What I insist upon is, that this is an offence at common law, as it tends to corrupt the morals of the King's subjects, and is against the peace of the King. Peace includes good order and government, and that peace may be broken in many instances without an actual force. 1. If it be an act against the constitution or civil government; 2. If it be against religion; and, 3. If against morality.

11 S. T. 131.
Gilb. Rep. in
B. R. 297. but
S. P.

1. Under the first head fall all the cases of seditious words or writings. 2 *Roll. Abr.* 78. pl. 2. 1 *Vent.* 324. 3 *Keb.* 841. and the case of *The Queen v. Bedford*, Mich. 12 Ann. whose treatise of hereditary right was held to be a libel, though it contained no reflection upon any part of the then government.

[790]
1 Str. 416.
post. 834.

2. It is a libel if it reflects upon religion, that great basis of civil government and society; and it may be both a spiritual and temporal offence. *Cro. Jac.* 421. 2 *Roll. Abr.* 78. pl. 2. 1 *Vent.* 293. 3 *Keb.* 607, 621. In *Tremayne's Entries* 226. there is a sentence to have a paper fixed over the defendant's head, intimating that he had uttered blasphemous words tending to the subversion of government. There is one *Hall* now in custody on a conviction as for a libel intitled *A Sober Reply to the Merry Arguments about the Trinity*, and *Pasch.* 10 Ann. *Regina v. Clendon*, there was a special verdict on a libel about the Trinity, and it was not made a doubt of in that case.

3. As to morality. Destroying that is destroying the peace of the government, for government is no more than publick order, which is morality. My Lord Chief Justice *Hale* used to say, Christianity is part of the law, and why not Morality too? I do not insist that every immoral act is indictable, such as telling a

or the like; but if it is destructive of morality in general, if it does, or may, affect all the King's subjects, it then is an offence of a publick nature. And upon this distinction it is, that particular acts of fornication are not punishable in the temporal courts, and bawdy-houses are. In Sir *Charles Sedley's* case it was said, that this court is the *Custos morum* of the King's subjects. 1 *Sid.* 168. And upon this foundation there have been many prosecutions against the players for obscene plays, though they have had interest enough to get the proceedings stayed before judgment. *Tremayne's Ent.* 209, 213, 214, 215. 3 vol. *State Trials*, Lord Grey's case.

Mich. 10 W. 3. Rex v. Hill, the defendant was indicted for printing some obscene poems of my Lord *Rochester's*, tending to the corruption of youth; upon which he went abroad, and was outlawed; which he would not have done if his counsel had thought it no libel.

The spiritual courts punish only personal spiritual defamation by words; if it is reduced to writing, it is a temporal offence. *alk.* 552. *Mo.* 627. and it is punishable as a libel. My Lord *oke* in the case *de libellis famosis* had nothing in view but scandalous defamatory libels. *Libellus* is not always to be taken as a technical word; in this case it may stand as an obscene little book. And as to the case of *Read*, there was no judgment, but went off upon the Chief Justice's saying, Why don't you go to the spiritual court; which was giving a false reason for that sudden opinion, now it appears there is no instance of the spiritual court's intermeddling, where it is reduced to writing or in print.

Chief Justice, I think this is a case of very great consequence, though if it was not for the case of *The Queen v. Read*, I should make no great difficulty of it. Certainly the spiritual court has nothing to do with it, if in writing: and if it reflects on religion, virtue, or morality, if it tends to disturb the civil order of society, I think it is a temporal offence. I do not think *libellus* always to be taken as a technical word. Would not trover *de quodam libello intitulat'* the New Testament, and does not the spiritual court proceed upon a libel?

Fortescue J. I own this is a great offence, but I know of no law by which we can punish it. Common law is common usage, and where there is no law there can be no transgression. At common law drunkenness, or cursing and swearing, were not punishable; and yet I do not find the spiritual court took notice of them. This is but a general solicitation of chastity, and not indictable.

indictable. Lady *Purbeck's* case was for procuring men and women to meet at her house, and held not indictable, unless there had been particular facts to make it a bawdy-house. To make it indictable there should be a breach of the peace, or something tending to it, of which there is nothing in this case. A libel is a technical word at common law, and I must own the case of the *Queen v. Read* sticks with me, for there was a rule to arrest the judgment *nisi*. And in Sir *Charles Sedley's* case there was a force in throwing out bottles upon the people's heads.

Reynolds J. It is much to be lamented if this is not punishable: I agree there may be many instances, where acts of immorality are of spiritual cognizance only; but then those are particular acts, where the prosecution is *pro salute anime* of the offender, and not where they are of a general immoral tendency: which I take to be a reasonable distinction. *Read's* case is indeed a case in point. But I confess I should not have been of that opinion. *Libellus* does not *ex vi termini* import defamation, but is to be governed by the epithet which is added to it. This is surely worse than Sir *Charles Sedley's* case, who only exposed himself to the people then present, who might choose whether they would look upon him or not; whereas this book goes all over the kingdom. Drunkenness and swearing were punishable in the spiritual court before the acts which made them temporal offences, and in which the jurisdiction of the spiritual court is saved.

Probyn J. inclined this to be punishable at common law, as an offence against the peace, in tending to weaken the bonds of civil society, virtue, and morality. But it being a case of great consequence, it was ordered to stand over for a further argument.

[792] And this term *Page J.* being come into the King's Bench in the room of Justice *Fortescue*, it was to have been spoke to by Mr. Solicitor General and myself. But *Curl* not having attended me in time, I acquainted the court I was not prepared: and my want of being ready proceeding from his own neglect, they refused to indulge him to the next term. And in two or three days, they gave it as their unanimous opinion, that this was a temporal offence. They said it was plain the force used in *Sedley's* case was but a small ingredient in the judgment of the court, who fined him 2000*l.* And if the force was all they went upon, there was no occasion to talk of the court's being *conformum* of the King's subjects. They said if *Read's* case was to be adjudged, they should rule it otherwise: and therefore in this case

case they gave judgment for the King. And the defendant was afterwards set in the pillory, as he well deserved (1).

(1) An information was granted against Mr. *Wilkes* for a similar offence, and this objection was not taken. 4 *Burr.* 2527.

Gee *vers.* Brown.

At Guildhall coram Eyre C. J. de C. B.

IN an action upon an inland bill of exchange brought by the indorsee against the drawer, it appeared the bill was payable 14 May; that upon a promise of payment the indorsee gave him to the 18th, from thence to 20th, thence to 24th, and from thence to 7th of June, when the acceptor failed. And there being no notice to the drawer, the Chief Justice held it to be the loss of the indorsee (1). *Strange pro def.*

Within what time a bill must be received.

(1) *Anon.* 1 *Vent.* 45. *Daglish v. Weatherby*, 2 *Black.* 747. S. P. adm. *Brough v. Perkins*, 3 *Salk.* 69. 2 *Ld. Raym.* 993. *Findal v. Brown*, 1 *Term Rep.* 167. In like manner the holder if he presents a note or a bill, whether foreign or inland, for acceptance, must give notice of a refusal to accept, or the drawer will be discharged. *Goostrey v. Mead*, B. L. N. P. 271. *Blesard v. Hirst & al.* 5 *Burr.* 2670. *Goodall v. Dolley*, 1 *Term Rep.* 712.

Hilary Term

1 Georgii 2. Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*

Sir Francis Page, *Knt.*

James Reynolds *Esq.*

Sir Edmund Probyn, *Knt.*

} *Justices.*

Sir Philip Yorke, *Knt. Attorney General.*

Charles Talbot, *Esq. Solicitor General.*

Lee *vers.* Welch.

Leaving out
super se assumpsit
is ill on a judg-
ment by default.
L. Raym. 1516.
S. C.

(a) S. C. T.
Raym. 23.
1 Keb. 878.

THE plaintiff declared in *C. B.* that the defendant was indebted to him in so much money for goods sold and delivered, *et sic indebitat' existens bene et fideliter solvere et contentari vellet*, leaving out *in consideratione inde super se assumpsit et eidem Willielmo adtunc et ibidem fideliter promisit, quod, &c.* And after judgment by default, it was reversed on error, there being no promise actually laid in the declaration. 1 Lev. 164. 1 Salk. 246. (a) *Strange pro def' in errore.*

Dominus Rex *vers.* Channel.

Indictment lies
not against a
miller for de-
taining part of
the corn.
1 Sess. Ca. p.
366. No. 290.

INDICTMENT against the defendant, for that he kept a common grist mill, and being employed by William B. to grind three bushels of wheat, did *vi et armis illicite* take and detain forty-two pounds weight of the wheat. Upon a demurrer judgment was given for the defendant, there being no actual

force laid (1), and this matter of a private nature, for which an action would lie (2). 27 Aff. pl. 19. 2 Keb. 391. Trin. 3 Geo. Rex v. Belfon, 1 Sid. 209.

(1) Vide Rex v. Storr, 3 Burr. 1701. that *vi et armis* does not alone imply such a force as will support an indictment. See also Rex v. Baker, *ib.* 1735.

(2) Rex v. Combrune, 1 Wils. 301. Rex v. Wheatly, 2 Burr. 1125. Rex v. Dunnage, *ib.* 1130. Rex v. Osborne, 3 Burr. 1697. determined upon the same principle.

Wilson *vers.* Poulter.

In Middlesex coram Raymond C. J.

IN trover the defendant was charged with his confession in a deposition taken before commissioners of bankrupt, and the Chief Justice refused to let the defendant into any *parol* evidence to explain it (1). No *parol* evidence to explain a deposition.

(1) Parol evidence cannot be admitted to vary the substance of a written agreement. *Sheres & al' v. Ansell & al'*, 3 Wils. 275. *Preston v. Menceau*, 2 Black. 1249. *Gunnis v. Erbart*, C. B. H. Black. Rep. 289. But it is admissible where it does not contradict, but explain a deed or other instrument. *Rex v. Samborn*, 3 Term Rep. 609. *Freeland v. Burt*, 1 Term Rep. 701. Per *Hardwicke* C. in *Baker v. Paine*, 1 Vez. 459. and in *Blunt v. Comyns*, 2 Vez. 31. So also to prove other considerations than those expressed in a deed. *Filmer v. Gott*, 7 Bro. C. 70. *Rex v. Scamonden*, Term Rep. 474. *Contra Clerkson* *Harway*, 2 P. Wms. 203. But has been admitted in equity to prove a variation between the intended and executed agreement upon a suggestion that it has happened through mistake, fraud, or the previous agreement of the contracting parties for a particu-

lar purpose: and for the former causes, more especially in executory articles and mercantile engagements. *Henkle v. Royal Exchange Assurance Company*, 1 Vez. 348. *Baker v. Paine*, *ib.* 456. *South Sea Company v. D'Oliffe*, 2 Vez. 376. *Lady Shelburne v. Lord Inchiquin*, 3 Bro. Chan. Ca. 338. *Harvey v. Harvey*, 2 Chan. Ca. 180. Per *Reynolds C. B.* in *Fitzgerald v. Lord Fauconberg*, Fitzg. 113. *Pitcairne v. Ogbourne*, 2 Vez. 375. Et vide *Hardwood v. Wallis*, 2 Vez. 195. *Lord Irnham v. Child*, 1 Bro. Chan. Ca. 93. where it was rejected. But such evidence seems more readily admitted as a defence against a bill brought for the performance of a specific agreement, being in that case introduced to rebut an equity. *Legal v. Miller*, 2 Vez. 299. *Joynes v. Statbam*, 3 Atk. 388. *Walker v. Walker*, 2 Atk. 98. *Eden v. Lord Buts*, 7 Bro. P. C. 404. 445.

Between the Parishes of Bishops Hatfield and St. Peters in St. Albans.

Hired servant is settled where the service is.
2 Sess. Ca. 136. No. 1.
Foley 217.
Fort. 318.
Burr. S. C. 493.
1 Burr. 495.
2 Bott by Conf. 458. pl. 409.
Cited and explained by Lord Mansfield, in *Alton v. Elwell*,
Burr. S. C. 424.
Ante 528.

ORDER of two justices to remove a man and his wife and their daughter from *Hatfield* to *St. Peters*. Upon appeal to the sessions, they state the case specially: that 3 August 1725. *Henry Langley* was hired in *St. Peters* by Mr. *Arnold* (who had no settlement there) for one year, to serve as his huntsman; that Mr. *Arnold* had a dog-kennel in *St. Peters*, where *Langley* was dieted and served the year: but inasmuch as *Arnold* himself had no settlement there, they vacate the order which sent him to *St. Peters*. *Et per curiam*, The order of sessions must be quashed, for this is exactly the case of the servant employed on the road to look after stage horses belonging to one who lived elsewhere; and yet the settlement was adjudged to be where the service was (1). *Strange pro St. Peters*.

(1) *Rex v. East Ilfley*, Burr. S. C. 722. S. P.

Dominus Rex *vers.* Edwardum Elwell, Bart.

Where there is a conviction the court will not discharge on the warrant of commitment without having the conviction before them.
L. Raym. 1514.
B. R.
cannot set fine on a conviction by justices of peace.
1 Barn. B. R. 30. 32, 39.
1 Sess. Caf. 360.
See the conviction in *English*
3 Lord Raymond by *Bailey* p. 360.

HE was brought up upon an *habeas corpus*, with a return of the cause of his commitment, which was upon a conviction of forcible entry and detainer. And it being moved to discharge him upon exceptions to the commitment; the court refused to enter into the consideration of them, till the conviction was likewise regularly removed before them. But by consent he was bailed in the mean time. And

This term, the conviction being before the court, it appeared that there was no fine set by the justices, and it was therefore moved to be quashed. It was agreed on both sides, that there should be a fine; but it was insisted, that it being now before the King's Bench by a *certiorari*, they might set the fine. *per curiam*, We are not to execute the judgment of an inferior court. The conviction is to be upon view, and they who view the nature of the force are the properest judges what fine to set; and though a *certiorari* should come, before the fine is set; it would be no contempt in the justices to compleat their judgment by setting one. *Lambert* indeed was of opinion, that

[*795]

(1) *Rex v. Hawks*, *post*. 858.

justices could not set the fine at all; but upon what foundation, we can never imagine. The justices are not bound to do it upon the spot, but may take a reasonable time to consider of the fine; but then they cannot commit the party, whilst they consider of the fine; because by the words of the act the commitment is to be till he has paid the fine. The conviction must be quashed, and the defendant discharged. *Rex v. Layton*, 2 Keb. 716. (1)

(1) *Vide Rex v. A. Hall*, Cowp. 60.

Easter Term

1 Georgii 2 Regis. In B. R.

Sir Robert Raymond, Knt. Lord Chief Justice.

Sir Francis Page, Knt.

James Reynolds, Esq;

Sir Edmund Probyn, Knt.

Sir Philip Yorke, Knt. Attorney General.

Charles Talbot, Esq; Solicitor General.

} *Justices.*

Reynolds vers. Thorpe.

In avowries
commencement
of particular
estates must be
shewn.

*See 11 Geo. 2.
c. 19. § 22. by
which this is re-
medied.*

*1 Barn. B. R.
46. S. C.*

IN replevin the defendant avowed for rent, and shewed that *A. habens titulum*, demised to him, and that he made an under-lease to the plaintiff. And on demurrer, it was resolved to be ill, according to the case of *Scilly v. Dally*, *Salk.* 564. 3 *Lev.* 193. 5 *Co.* 1. And judgment was given for the plaintiff.

Crutchfield vers. Scott.

Money may be
brought into
court at the suit
of an executor.
*1 Barn. B. R.
47. S. C. (1)*

THE question was, whether in an action by an executor the defendant should be allowed to bring money into court. And on consideration it was held he might, and that

(1) The report in *Barnard.* represents the court to be of opinion that the money might be brought

into court, and yet it states a motion to have been refused.

effect of it would be, not to make the executor pay, but only lose his subsequent costs (2). *Mich. 3 Geo. 1. Baker v. Turberville*, allowed so to do (3).

(2) *Knighr, executrix, v. Dutches of Hamilton, in Scacc. S. P. Bunb. 44.* 3 *Salk.* 104. *contra.* (3) *Gregg's case, Salk. 396. B. R. Bryan v. Holloway, Barnes 279. C. B. contra.*

Wilkinson *vers.* Poole.

[797]

THE court made the defendant pay costs for not going on to trial by proviso according to notice (1).

Defendant pays costs for not trying by proviso.

(1) *Vide Rex v. Pipper, 1 Term Rep. 695. Reading v. Grafton, Pract. Reg. C. P. 405.*

Evans *vers.* Higgs.

STRANGE moved to discharge the defendant out of execution, as being an ambassador's servant, viz. his *English* secretary. And it was objected, he did not lie in the house; and the words of 7 *Ann. c. 12.* are *domestick servants. Sed per curiam*, The nature of his employment requires his attendance at the house, and it is not necessary he should lie there. And the general words *all writs and processess shall be void*, take in this case, and therefore the execution must be set aside.

Privilege of ambassadors (1). *L. Raym. 1524.*

Hil. 4 Geo. 2. Widmore v. Alvarez. In the case of the *French* ambassador, it was ruled, that the person need not lie in the house, but he must do some actual service there. *Fitzg. 208.*

(1) See the cases upon this subject collected 1 *Com. Dig. (Ambassador) (B.) p. 441. Vide in addition Hopkins v. De Robeck, 3 Term Rep. 79.*

Lancaster *vers.* French.

THE plaintiff being a carpenter, brought an action for these words, "He has charged Mr. *Andrews* for forty days work, and received the money for the work, that might have been done in ten days, and he is a rogue for his pains."

Words not actionable. 1 *Roll. Abr. 55. pl. 24. 5 Mod. 398. Salk. 694.*

After verdict for the plaintiff the judgment was arrested, the words not being actionable (1).

(1) *Bellamy v. Barker*, ante *Kent v. Pocock*, post. 1168. *Jones* 304. *Ludwell v. Hole*, ante 696. *v. Hearne*, 2 *Wils.* 87.

Dominus Rex vers. Episcopum Chester.

Mandamus lies for a chaplain where the visitatorial power is suspended by the union of the office of visitor to that to which the *mandamus* is to be directed. 8 *Mod.* 364. 1 *Barn. B. R.* 52. cited in *And.* 181.

2 *Burr. Rep.* 3043.

[*798]

MANDAMUS directed to the bishop as warden of *Manchester* college, to admit a chaplain. The bishop returns, that by the royal foundation, he is appointed visitor. And upon argument it was objected, that though a *mandamus* will not lie where there is a visitor free from any objection; yet here the two offices being in the same person, he cannot visit himself; and no case can be shewn, where the founder has once granted the whole out of him, and on such a temporary suspension, it has resulted back.

**Et per curiam*, It is plain he cannot visit now, because his power is suspended, and these are powers that may cease, and revive, without inconvenience, since there is this court to resort to. In a lay corporation the founder and his heirs are visitors (1): in a spiritual one, the jurisdiction is here, unless there be an express visitor appointed: the ground of our interposing in this case is, that at present there is no other visitatorial power being (2). A peremptory *mandamus* was granted. *Vide* 2 *Geo.* 2. c. 29.

(1) 1 *Black. Com.* 481.

(2) *Vide Herne's case*, cited 2 *Stilling.* *Case of Exeter College*, 1 *Burn's Ecc. Law*, title *College*, 411. *Green v. Rutherford*, 1 *Vez.* 471. *Rex v. Gregory*, *E.* 12 *Geo.* 3. 4 *Term Rep.* 240. n. (a) and the opinion of *Buller J.* in *Rex v. Bishop of Ely*, 2 *Term Rep.* 339. But it has been held that in the case of a private eleemosynary lay foundation, where no special visitor is appointed, and there is a failure of heirs of

the founder, the right of visitation devolves upon the King and must be exercised by him in his court of Chancery, and the court of *B. R.* on that ground refused to interfere by *mandamus* to compel the master and fellows of *St. Catherine's Hall* to decide one of the fellowships vacant and proceed to a new election. *Rex v. The Master and Fellows of St. Catherine's Hall Cambridge*, 4 *Term Rep.* 233. *Et vide* 12 *Mod.* 232.

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The Case of the Constables of Limington.

THEY were chosen and sworn in at the leet; and the sessions, on pretence that the election was not made according to the particular usage of the place, made an order to discharge the appointment. And now the order of sessions was quashed, for at common law they had nothing to do with the election of constables, and the 13 & 14 Car. 2. c. 12. gives it them only in the case of death or removal within the year (1).

Sessions cannot discharge constables appointed at the leet.

Salk. 175.
T. Jones 213.

(1) Vide *Rex v. Hewson*, 12 2 Hawl. P. C. c. 10. f. 49, 50. Mod. 180. *Rex v. Goudge*, post. p. 103. 1 Bac. Abr. 439. 4 Com. 213. *Rex v. Lone*, Fitzg. 192. Dig. Leet, (M. 6.) 694.

Shaw *vers.* Weigh.

Mich. 9 Geo. rot. 108.

UPON Not guilty in ejectment for lands in the county of Flint, on a trial at the grand sessions, the jury find this special verdict.

Devise of lands and hereditaments to A. and B. in trust for others in tail and in fee, is a devise in fee to the trustees though there be not the words *heirs*, or *for ever*. Devise to A. for life, then to trustees in trust for his sisters equally, during their natural lives, without committing waste, with proviso that they shall be reimbursed whatever part of the 500*l.* they shall

That *Thomas Ravenscroft* being seised in fee of the premises in question, by his will dated in August 1675. devised the same to his wife *Dorothy* for her life, and for her better support, he so devised her 500*l.* to be raised by sale of timber, or digging of coal; and after her decease he devised the premises to three trustees and the survivor of them, in trust for his two sisters *Anne Lunsford* and *Dorothy Evatt*, equally between them, during their natural lives, without committing any manner of waste; provided that whatever part of the 500*l.* should be paid his wife or either of his sisters, the same shall be reimbursed to them by selling of coal upon the premises only; and if either of his sisters should happen to die leaving issue or issues of her or their bodies lawfully begotten, then in trust for such issue or issues of the mother's share, or else in trust for the survivor or survivors

by getting coals off the premises, "and if either of his sisters should happen to die, leaving issue or issues of her or their bodies, lawfully begotten, then in trust for such issue or issues of the mother's share, or else in trust for the survivor or survivors of them, and their respective issue or issues, and if it should happen that both sisters should die without issue as aforesaid, and their issue or issues to die without issue or issues lawfully to be begotten," then a devise over in tail male. The sisters take an estate for life only, contingent remainders to their children. 3 Danv. 178. 8 Mod. 253. 382. Fort. 58. Fitzg. 7. 1 B. R. 54. 1 Eq. Ab. 184. pl. 28. S. C. 3 Bro. P. C. 469. Cited And. 339.

of them, and their respective issue or issues; and if it should happen that both the sisters should die without issue as aforesaid, and their issue or issues to die without issue or issues lawfully to be begotten, then in trust for *John Swift* in tail male, remainder to *Ravenscroft Gifford* (the lessor of the plaintiff) and the heirs male of his body, with several remainders over. That the deviser died, and his wife entred, and enjoyed for her life; and on her decease the two sisters entred and were possessed. That *Anne* (one of the sisters) died without issue, and *Dorothy Evatt* survived her, and 9 April 1688. levied a fine, and suffered a recovery, to the use of herself in fee. That *John Swift* died without issue in the life of *Dorothy Evatt*, who is since dead also without issue, upon whose death *Ravenscroft Gifford* entred and made the lease to the plaintiff, who entred and was possessed till ejected by the defendant: *sed utrum, &c. Et si pro quer', pro quer'; et si pro def' pro def'*.

Upon this special verdict judgment was given in the court of grand sessions for the defendant. And on error in *B. R.* the general errors are assigned.

Before they entred upon the main point, a previous question was stirred by the counsel for the plaintiff, what estate the trustees took by virtue of this will: and they contended, that though the devise was only to them and the survivor of them, without the words *heirs* or *for ever*, yet the carving out so many estates of inheritance, that were to be served out of the trust, shews the intent of the deviser to give them an estate in fee; since nothing else could be sufficient to satisfy all the trusts. And 3 Co. 20. b. *Cro. Eliz.* 204. 2 *Cro.* 527. 6 Co. 16. *Salk.* 236. were cited, where the word *estate* carried a fee; here it is *houses, lands, tenements, and hereditaments. Hob.* 2. *Mo.* 873. 1 *Ver.* 299. 2 *Jon.* 57. 2 *Lev.* 169. But this point was not contested by the defendant; and the court said it must certainly be a fee in them; though if it should not, the will would have the same effect, by the devisee's taking as upon an immediate devise.

But the main question arose upon the devise to the sisters, whether they were tenants for life or tenants in tail; which had this consequence, that if they were but tenants for life, the fine and recovery by *Dorothy* the survivor were no bar; but if they were tenants in tail, the remainder over to the lessor of the plaintiff was barred.

And *Reeve pro quer'* argued, that under this will the two sisters were but tenants for life, with contingent remainders to their

Issue in tail. The words of the will are strong for this purpose; he devises it to them two *equally between them during their natural lives without committing any manner of waste*, which shews his intent, that they should not have such an estate as would protect them in committing of waste. So is that other clause by which the sisters are impowered to reimburse themselves so much of the 500*l.* as they shall pay, by getting of coals on the premises only; which power will be useless, if it be construed an estate-tail.

[800]

Here are no express words that give it for more than their lives, and it is indisputable, that in a deed it would be an estate for life only. But whether it shall be carried further in this case, which is a will, must depend upon the authorities that will be cited on either side. I expect to hear the case of *King v. Mellington*, 1 *Vent.* 214. 225. cited against me; but upon that I must observe, that there was not this clause of being punishable for waste. In the case of *Backhouse v. Wells*, *Hil. 12 Ann. in B. R.* the devise was for and during the term of his natural life only, without impeachment of waste, and after his decease to the issue male of his body: and it was resolved, that this was but an estate for life, first, because of the word *only* that was added, and in the next place on account of the clause of being punishable of waste, which the court said ousted all pretence of an estate-tail, and was much stronger than the power to make a jointure in *King v. Mellington*, for that was of service even after the devise was construed to be a tail, by enabling the devisee to make a jointure, without suffering a recovery.

3 Atk. 796.

Abr. Ca. Eq. 184.

In the case of *Loddington v. Kime*, 3 *Lev.* 432. there was not the word *only*, but *without impeachment of waste* was in, and governed the resolution that made it but an estate for life.

And that which makes this construction the more reasonable is, that the remainders over to *Swift*, and the lesser of the plaintiffs, are conceived in the proper terms to make it an estate-tail to them. It is to *John Swift* and the heirs male of his body lawfully begotten, and for want of such issue to *Ravenscroft* and the heirs male of his body, with remainders over. Now can it be imagined, that the deviser did not intend to pass different interests, when he made use of such different expressions? It proves in my apprehension, that he knew what words were most proper to carry an estate-tail, and that where he did intend to pass a tail, he has not used them.

The words *survivor or survivors of them* must relate to the issue, and not to the sisters, because he makes use of the plural number, there can be no survivors out of two sisters.

[801]

He made another point, that if it be construed an estate tail, yet the lessor of the plaintiff will be intitled to a moiety; because *Anne Lunsford* was tenant in common, and died before the recovery suffered by the other sister, the consequence of which is, that the remainder was vested in the lessor as to a moiety. 5 Co. 7. 8 Co. 85.

Boote contra argued, that it was an estate-tail in the sisters, with cross remainders to their issues. That *issue* in a will is equivalent to *heirs of the body* will not I believe be disputed. It is always taken to be *nomen collectivum*, and in this sense the word *exitus* is used in the statute *de donis*. If then a devise to *A.* and his issue is as strong as a devise to him and the heirs of his body, let us see how it stands upon the words of this will. Here it is to them two equally to be divided, and if they happen to die without issue the remainder over: now I do not contend that this is an express devise in tail, as in the former case put of a devise to *A.* and the heirs of his body; but it will be sufficient for me, if it be such a devise by implication: as it was construed in the case of *King v. Melling*, which was a devise to *A.* for life expressly, and after his decease to such issue as he should have of the body of his second wife, (his first then being alive) and it was held to be an estate-tail in *A.* What difference is there between the two cases? this only, that I can perceive (and which makes our case the strongest) that in that case the words *for life* are expressly mentioned, but in our case they are not.

Will. Rep.
754

Ab. Ca. Eq.
185.

In the case of the Attorney General against *Sutton* and *Paman*, which was in the house of Peers, *Hil. 7 Geo.* the decree indeed was reversed as to another point, but as to the following point they agreed with the court below, that a devise to *A.* and his first and second issue male, without going any further, was an estate-tail. So in the case of *Langley v. Baldwin* in *C. B.* 19 May 1707. upon a case referred from my Lord Chancellor, the devise was to his eldest son for life without impeachment of waste, and after his decease to my grandson for life without impeachment of waste, and with a power to make a jointure, and after his decease to his first son and the heirs male of his body, and so as far as a sixth son; and if my said grandson dies without issue male, then he devised it over: and the question was, whether the limitation stopping at a sixth son, and not going on to every other son and sons, and there being the clause as to waste and for making a jointure, it should be an estate-tail in the grandson: and by the unanimous opinion of the court of *C. B.* it was resolved to be an estate-tail: this case destroys all the arguments drawn from the clause against committing waste.

The

(1)

The case of *Loddington v. Kime* was adjudged upon the express words, "to *Evers Armin* for his life, and in case he shall have issue male, to such issue male and *his* heirs for ever:" which word *his* related to the issue male, and not to *Evers Armin*: and also because in the same will he afterwards takes notice of that issue male as the person to whom I have given the inheritance: there the words (as I said before) were express and good sense, but here they are nonsensical, if they die without issue, and the issue dies without issue.

As to the other point, by which Mr. *Reeve* would intitle the lessor to a moiety; he cited *Raym.* 452. Sir *T. Jones* 172. that these being cross remainders (1), and one dying without issue, the fine and recovery by the other would be a bar for the whole.

Pratt Chief Justice, I say nothing at present to be bound by, but as thus advised I think it a strong point that this is an estate-tail in the sisters. I cannot allow this to be a contingent remainder, it is only a description when the issue shall take; and certainly a devise to one and his issue, is the same as if it had been to him and the heirs of his body. In *Loddington v. Kime* it was but a *designatio personæ*. And as to the other cases cited by Mr. *Bootle*, I think them exactly the same with the present case.

Powys Justice accord, that it was an estate-tail.

Fortescue Justice, My present opinion is, that this is an estate-tail. Issue is the most expressive word that could be used, because it extends in infinitum. *Loddington v. Kime* does not come up to this, for *his heirs* was confined to the first issue, and was exactly the same with *heir male* in *Archer's* case. The case of *King v. Melling* was adjudged to be a tail, because the word *issue* did not make a *designatio personæ*, which is in this case.

Raymond Justice, Certainly the adding any clause relating to waste can never alter the operation of law, and so said my Lord Chief Justice *Hale* in that case of *King v. Melling*. Issue may in some cases be a *designatio personæ*, but I see nothing in this case to make it so. The using the plural number, survivors, is the only word that looks that way: if you refer it to the two sisters, it will signify nothing; but it sticks with me, that it is not

(1) Vide *Camber v. Hill*, 197. 969. *Brown v. Williams*, post. 996. applica-

applicable to the case of two sisters only. *Per curiam, ultimum concilium*

According to the report in *Forscush* it was argued 4 times.

Pasch. 11 Geo. it was argued a second time: when Reynolds Justice inclined it but an estate for life; so it stood upon a *curia advisare vult* till this term: when,

What words in a will create an estate for life only.

[103]

Raymond Chief Justice delivered the resolution of the court. The term in the declaration being expired, it may be thought unnecessary to deliver our opinions: but as there was judgment against the plaintiff below to pay costs, and as if that judgment is erroneous he will be intitled to damages; he has a right to be relieved in these instances, though as to recovering the possession he is too late. And we are all of opinion, that the judgment given below is erroneous, and ought to be reversed.

The first question that was made was, what estate the trustees took by this will, it being only a devise to them and the survivor of them, without the words *heirs*, or *for ever*. Now as to this we all think it must be construed a devise in fee, because otherwise it can never serve all the trust estates which are carved out of it; and whoever reads the will, cannot but be satisfied that it was his intent it should be so: it is therefore a devise in fee by implication (2); or if it was not, it would come to the same thing in this case, because the devisees for whom they are in trust would take by way of immediate devise. 1 *Roll. Abr.* 611. K. 12.

The next and principal question was, what estate the two sisters took, whether an estate tail, or for life only. If it was in tail, then the judgment below was right, and the fine a bar; if it was only for life, then the fine will be no bar, and the judgment wrong by which it is set up as such.

And we are all of opinion, that the sisters took an estate for life only, with contingent remainders to their children; and this both from the words and intent of the will. As to the words: it is to them during their natural lives, without committing any manner of waste, and these are the strongest words that can be used in a will for that purpose. As to the intent: 1. The precedent devise to his wife is in the same words, and it is plain and manifest he intended she should have it but for life. 2. The

(2) *Vide Bagshaw v. Spencer, Talb. 145. Gibson v. Lord Mansfield, 1 Vex. 144. 2 Atk. 576. S. C. fort. 1 Vex. 491. Oates v. Cady, Chapman v. Blisset, Cas. temp. 3 Burr. 1686.*

proviso for raising the 500*l.* is a strong argument he meant they should take only for life; for if it was in tail, they might sell timber, or dig what coals they pleased; and it is observable, that he has given the two sisters less power in that respect, than he gave his wife; for the wife could raise the money by sale of timber or digging of coal, but the sisters are to raise it by getting of coal only. 3. It is very observable, that the issue of the two sisters have not this power given them; which shews he knew, the general power they would have as tenants in tail did not need to have such a clause added for them. 4. The clause by which he restrains his sisters from committing waste is an evidence of his intent to give it but for life. 5. The words *and if either of my sisters happen to die leaving issue, then in trust for such issue*, do not make *issue* a word of limitation, but only a *designatio personæ*, he intended should take after his sisters. The word *issue* has not one determinate sense, in which it is to be taken in all cases, no not in common law conveyance, and much less in a will, where the intent of the party is chiefly to be regarded. If a man makes a feoffment to *A.* and his issue male, this is not an estate tail in the feoffee, for want of the word *heirs*. 1 Roll. Abr. 837. R. 1. Where *issue* is a word of limitation, it is *nomen collectivum*, but where it is a *designatio personæ*, or a word of purchase, it is not. And though *Levinz* in his report of the case of *Laddington v. Kime*, (3 Lev. 435.) (a) takes notice that no judgment was given, but the parties accommodated the matter, yet he is mistaken in that, for *Pasch. 9 W. 3.* it was argued *seriatim* by the court, and the point determined that *Evers Armin*, took but for life (b); and the determination in Chancery and the House of Lords were both conformable to that judgment.

[304]

(a) 1 Salk. 224.
1 Eq. Ab. 182.
c. 23. S. C.
(b) Vide 1 Ld. Raym. 203.
3 Will. 240.

The case of *Backhouse v. Wells*, (c) which was cited at the bar, and is entered *Trin. 11 Ann. rot. 220.* is likewise a strong case in point: for there the court relied very much upon the clause about impeachment of waste, to shew the intent of the testator to pass only an estate for life, and to make the word *issue* a *designatio personæ*, and not a word of limitation (3).

(c) 1 Eq. Ab. 184.
10 Mod. 181.
Gilb. Eq. Rep. 20. 129.
Fort. 133. S. C.

6. The

(3) The word *issue* in a will is generally and properly a word of limitation. Per Lord Hardwicke in *Bagshaw v. Spencer*, 1 Kez. 1. Per Gould J. in *Roe v. New*, 2 Will. 324. *Goodtitle v. Way*, 2 Will. 6. But it is taken either as a word of purchase or of limitation as will best effectuate the intent of the testator. Upon this ground it has been held to operate as a word of limitation in *Roe v. Grew*, 2 Will. 322. *King v. Burchall*, Amb. 379. 4 Term Rep. 296. n. *Doe v. Collis*, ib. 294. *Denn v. Puckey*, 5 Term

Vide the 4th ed.
Essay on Cont.
Rem. 228.

6. The words *survivor or survivors of them*, if they are of any use, must refer to the issue, and not to the two sisters, out of which there can be no survivors; and since they may consistently with the other words of the will be applied to the issue, we think they are too material to be rejected, and rejected they must be, unless they are so applied. The word *issue* may have a different construction, even in the same will (4): a devise to *A.* and his issue will make it a word of limitation; but if it be to *A.* for life, and after to his issue, and the issue or heirs of the body of such issue; in the first part it will be *designatio persone*, and in the second a word of limitation: and that was the opinion of the court in both the cases of *Lodding v. Kime* and *Backhouse v. Wells*, where they did not intirely found their judgment upon the word *only*. In 1 Vent. 232. the words of limitation being grafted upon the word *heir*, was construed to make the first only a *designatio persone*, and so was the case there mentioned of *Clark v. Day*, but the true name is *Cheat v. Day*, Cro. Eliz. 313. Ow. 148. Mo. 593. 1 Roll. 832. And though no judgment is entered on the roll, yet *Moore* says, the opinion of the court was given; and *Hale* cites it as such in the case of *King v. Melling*.

[805]

And as to that case of *King v. Melling*, it appears to have been ruled with great difficulty, and *Hale* himself was of two opinions about it: as it is, it must now be taken for law; though we will not go an inch further, because it is manifest, that by such constructions people are let in to cut off entails contrary to the intent of the devisor. And there is this difference between that case and this, that there was no limitation over to the issue or heirs of the body of the issue, as here; so that our judgment will not contradict the case of *King v. Melling*.

And as to the cases of *Langley v. Baldwin* and *Sutton v. Paman*, cited by Mr. *Bootle*, they do not come up to this; for there

5 Term Rep. 299. It has been taken as a word of purchase, not only in *Lodding v. Kime*, and *Backhouse v. Wells*, here cited. But in Lord *Glenorby v. Rosville*, Cas. temp. Talb. 3. *Meure v. Meure*, 2 Atk. 265. *Ashton v. Ashton*, 1 Vez. 149. which are cases of executory trusts created by will, and also *Doe ex dem Barnard et al. v. Reason*, 3 Wils.

242. Vide the Essay on Cont. Rem. 166 et seq. ib. 233.

(4) So different constructions may be put upon the same words in a devise, where they are applicable to different subjects. *Forb v. Chapman*, 1 P. Wms. 667. *Harris v. Bishop of London*, 2 P. Wms. 663. *Sheffield v. Lord Orreery*, 3 Atk. 388. *Earl of Stafford v. Buckley*, 2 Ves. 180.

it was construed an estate tail by implication upon the apparent intent that (5) the devisee's family should have it so long as there was any issue, though a limited number of sons were only mentioned in the will. And as to the word *only*, in the case of *Backhouse v. Wells*, we think the intent of the devisor is as strong, as if the same word had been in this will, and therefore that case is an authority in point.

So that upon the whole we are of opinion, that the two sisters took only an estate for life; the consequence of which is, that the fine and recovery, though they were a forfeiture of the estate for life, could not bar the remainder to the lessor of the plaintiff, against whom judgment was given below, which we think ought to be reversed, and judgment given for the plaintiff to recover damages, but not the possession.

Afterwards this cause went up to the House of Lords, on a writ of error brought by *William Sparrow* and others, and was argued by Mr. Attorney General and Mr. *Bootle* to make it an estate tail, and by Mr. *Fazakerley* and Mr. *Strange* to make it but an estate for life. And all the Judges being ordered to attend, took time to consider of it. And at another day nine were of opinion that it was but an estate for life, viz. *Raymond*, *Price*, *Page*, *Reynolds*, *Hale*, *Carter*, *Denton*, *Probyn* and *Comyns*; and *Eyre*, *Pengelly*, and *Fortescue* held it an estate tail. And many Lords who were of opinion to affirm being gone away, the judgment of *B. R.* was late at night reversed, upon a division of ten Lords against seven (6).

See the arguments of the counsel in *Dom. Proc. in Fidei*, and of Mr. J. *Fortescue* in his own Reports 32.

(5) *Vide Throustout v. Peake*, stated in *Fort. Rep.* p. 90. that the judgment in *B. R.* was reversed *nemine contradicente*.

(6) If the fact can be considered as of any importance, it is

Trinity Term

2 Georgii 2 Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*

Sir Francis Page, *Knt.*

James Reynolds, *Esq;*

Sir Edmund Probyn, *Knt.*

} *Justices.*

Sir Philip Yorke, *Knt. Attorney General.*

Charles Talbot, *Esq; Solicitor General.*

Matthews *vers* Spicer.

In assumpsit the day is not material, and the plaintiff may allege a different one in his replication.

Fort. 375.
1 Barn. B. R.
54. 57. S. C.
1 Roll. Abr.
792. pl. 14.
Cro. Car. 575.
Cio. Jac. 69.

THE plaintiff declared in *assumpsit* upon a promise made 26 March 12 Geo. 1. The defendant pleaded, that after the promise, and before the bill filed, viz. 2 April, he tendered the money. The plaintiff replied, that after making the promise, scilicet 12 February, he filed his bill, &c. *Dem inde*, and *Reeve pro defendente* objected, that by the plaintiff's own shewing he has brought his action before the cause of action accrued; for the promise he declares on is 26 March, and his bill was filed 12 February before.

Sed per curiam, As the plaintiff would not in evidence have been confined to the day in his declaration, there is no reason he should be more confined in pleading. Indeed if this was a note, the day would be material, and an essential part of the agreement, from which he could not vary; but in the case of a common *assumpsit*, the day is alleged only for form, and therefore the defendant cannot confine the plaintiff to the day alleged in the declaration: and upon this distinction the cases of *Stafford v. Forcer*, *Pasch.* 1 Geo. 1. and *Cole v. Hawkins*, *Hil.* 3 Geo. 1. were adjudged. The plaintiff had judgment.

10 Mod. 311.

Ante 21.

Lady Falconbridge *vers.* Forrest.

IN an action of *scandalum magnatum* the court refused to change the venue from Middlesex to Chester, because it was to send it into a county palatine, and there was no instance of doing it in such an action (1). *L. Raym.* 1418.

Neque not to be changed into a county palatine, nor in *scandalum magnatum*.
1 Barn. B. R. 60. 63. S. C. Post. 153.

(1) According to the report in 1 Barnard. 68. the court discharged the rule, principally upon this ground. *Vide Duke of Norfolk v. Alderton*, Salk. 668. 1 Lev. 56. Carth. 400. S. C. Lord Griffin v. Buckby, Barnes 482. Gilb. C. P. 90. acc. With respect to the courts changing the venue into a county palatine, the reason given in *Godfrey v. Philpot*,

2 *Ld. Raym.* 1418. that the court can send the record down by *mitimus*, &c. is doubted by Buller J. in *Rex v. Amery*, 1 Term Rep. 368. But the cases of *Markham v. Norton*, and *Grawland v. Falknor*, cited 1 *Wils.* 422. accord with the case in *Ld. Raym.* and contradict the present. *Vide Tindal v. Gwynne*, post. 1270.

Wright *vers.* Canning.

THE writ of error was returnable before any judgment given; and on consideration it was held to be such a fault, as is not amendable by the statute 5 Geo. 1. c. 13. (1)

What writ of error is not amendable.
L. Raym. 1530
1 Barn. B. R. 62. 65. S. C.

(1) *Vide Rejndox v. Randolph*, post. 334.

Muttit *vers.* Denny.

IN ejectment against two defendants, it was said that they *intravit, expulit et amovit*. And after verdict *pro quer.*, I moved in arrest of judgment, and the court held it to be ill. But at another day they ordered it to be amended, though there was nothing to amend by, on the authority of *Cro. Jac.* 306. Salk. 48. and then the plaintiff had judgment (1).

Amendment.
1 Barn. B. R. 53. 63. S. C. Salk. 48. is contra. note to 2d ed.

(1) *Vide Doe v. Pilkington et al.* 4 Burr. 2447. *Oates v. Sheppard*, post. 1272. and the note.

Ante 512.

Henriques *vers.* The Dutch West-India Company.

If there be a warrant of attorney any time *pendente lite*, it is sufficient (1). No damages for delay of execution are recoverable upon a *scire facias* against bail (2).

L. Raym. 1532.

ERROR of the award of execution in *C. B.* in a *scire facias* against bail. The *placita* is of *Easter* term 11 Geo. with an *alias prout patet* of *Hil.* before. The *scire facias* is returnable in *octabis purificationis*, at which day the plaintiffs and defendant both appear by attorney, and imparl to *Easter* term. And after *nul tiel record* pleaded, there is judgment *quod quer' perfecerunt recordum*, and shall have execution for the debt and 6*l.* 10*s.* for damages and costs they have sustained by the delay of execution. Upon error the want of warrants of attorney is assigned, and a *certiorari* returned, that there are none either of *Easter* or *Hilary* term 11 Geo. And then the company come in and allege diminution, and bring up warrants of *Easter* term, the term in the *placita*, and plead *in nullo est erratum*.

[808]

Strange pro quer' in errore objected, that as the *scire facias* is returnable in *Hilary* term, and then the entry goes on, *et modo hic ad hunc diem veniunt* the parties by their attorneys, a subsequent warrant in *Easter* term after will not warrant their appearance in *Hilary* term before. And the act for amendment of the law requires the warrant of attorney for the plaintiff to be entred of the term he declares, which in this case is *Hilary* term. 2. The judgment is for 6*l.* 10*s.* for damages and costs which the plaintiffs sustained by the delay of execution; now at common law there were no costs in a *scire facias*, and the 8 & 9 W. 3. c. 10. which gives costs on a *scire facias*, mentions only costs of suit, but damages for delay of execution are given only on writs of error by 3 H. 7. c. 10. and the entry on writs of error is in this manner, but never in *scire facias*.

The court upon this state of the objections were strongly of opinion with them both. But another day Reeve *pro def' in errore* as to the first objection cited *Noke v. Caldecott*, Trin 8 Geo. ante 526. where it was held to be good, if there was a warrant of attorney at any time *pendente lite*; and there it was of a term subsequent to the *placita*: whereas here it is of the term in the *placita*. And upon the authority of that case the court overruled the first objection.

(1) *Vide Noke v. Caldecott*, ante 526. *Brook v. Manning*, Fitzg. 191. 1 Wils. 39. *Dyke v. Sweeting*, ib. 183. S. P.

(2) S. P. *Fanshawe v. Marjib*, 1 Salk. 208. 6 Mod. 157. S. C.

And as to the second it was not attempted to be supported: but what was contended for was, that the judgment for damages is a distinct judgment, and comes in with a *consideratum est etiam*; and therefore according to the case of *Green v. Waller*, Trin. 2 Ann. and *Bellew v. Aylmer*, Trin. 5 Geo. 1. the court held, that it might be reversed as to the 6*l.* 10*s.* damages, and affirmed as to the rest. And the judgment was pronounced accordingly.

Where the judgment for damages is distinct, it may be reversed in part, and affirmed *pro residuo* (1). Lill. Ent. 233. Ante 188.

N. B. 23 April 1730, on error in Parliament the judgment of B. R. was affirmed, and 100*l.* costs given.

(1) *Bellew v. Aylmer*, ante 189. *Kent v. Kent*, post. 973. and the cases cited. But where costs are merely accessory to the principal judgment, if they are erroneously given, the judgment cannot be reversed as to them alone, but must *in toto*. *Lampen v. Hatch*, post. 934. *Ross v. Eberington*, 2 *Ld. Raym.* 870. *Salk.* 312. S. C.

Cafe of the Bailiffs of Bridgenorth.

A *Mandamus* was directed to the two bailiffs; one of which was for obeying the writ, and the other would not, nor in a return. And the court granted an attachment against both, for they said it would be endless to try in all cases which was in the right, and it would be always used for a handle of delay.

Where a writ is directed to two, there must be an attachment against both, though one is ready to obey.

(1) 1 Barn. B. R. 53. S. C.

(1) See the same principle tried of freemen, per Lord Mansfield in the case of a penal C. J. *Schullam v. Bunnis*, Cowp. 197. *Et vide Rex v. Rye*, 2 Burr. 798.

Maylin et al' *vers.* Eyloe.

At Guildhall coram Raymond C. J.

[809]

ON 28 November, Hall rode out of town, and returned in the evening, before which a bailiff had been at his shop to arrest him: the next morning he sent for the bailiff, and told he went out in order to get the term of the plaintiff, and the return of the writ was out, if they would take out a writ he would give bail, which was done accordingly. And was held to be an act of bankruptcy within 1 Jac. 1. c. 15. which speaks of departing from his house with intent, and whereby

What an act of bankruptcy.

L

his

his creditors may be defeated or delayed from recovering their just debts (1). *Strange pro def.*

(1) *Dickinson, assignee, &c. v. Ford, Barnes* 160. *Colkett v. Freeman*, 2 Term Rep. 59.

Bottomley *vers.* Harrison.

What a sufficient certainty in trover (1).

L. Raym. 1529.
1 Barn. B. R.
47. 50. 65. S. C.

ERROR of a judgment by default in *C. B.* in an action of trover for several parcels of goods. And *Strange* objected, that the damages were intire, and as to one parcel of the goods it was too general, the words being *una parcella segestrium, involucrorum et funium, Anglice packcloths, rappers and cords*; so that there is not only the objection to the word *parcella*, which has been held ill; but there is likewise an incertainty as to what that parcel consists of. *Trin.* 1 Geo. 1. *Kempster v. Nelson*, *pro parcella lintei, Anglice childbed linen*, and *parcella papyri, Anglice writings*, was held ill in replevin. 2 Show. 433. Trover de *septem parcellis panni lintei*, too general. 2 Lev. 195. The word parcel likewise held ill in trespass, *Trin.* trover *pro diversis mercimoniis, Anglice earthen ware*, held ill.

Ante 738.

Salk. 654.

L. Raym. 991.

Lee contra. *Parcella* in this case signifies a bundle; and though formerly these exceptions have prevailed, yet of late years more general expressions have been allowed. *Pecia* was formerly held ill, and yet *Hil.* 13 Geo. *Radley v. Rudge*, trover for a piece of *tepee* was held well enough. In 1 Lev. 303. *assumpsit pro quadam parcella* was held good, and it is there said it would be the same in trover. *Harford v. Jones*, 12 W. 3. trover for 72 ounces of cloves, mace, and nutmegs; and adjudged to be sufficient, though the particular quantities of each were not specified. *Mich.* 2 Ann. *Thornton v. Barnard*. Trover for so many *farcinis, Anglice bundles of flax*, and upon motion in arrest of judgment it was adjudged for the plaintiff.

[810]

Strange replied. As to the case in *assumpsit*, there was always a greater latitude allowed; and will any man say that trover *pro diversis mercimoniis*, without specifying them, will lie? and yet it is every day's experience to declare so in *assumpsit*. Besides the case I cited out of 2 Lev. is subsequent in time, and therefore destroys the authority of that case, if it had been applicable.

(1) 1 Ld. Raym. 133. 191. 588. *Action upon the Case upon Trover* ante 619. post. 827. 1 Com. Dig. (G. 5.) 317.

to this: and as to the case of the piece of *tepee*, that is a certain known quantity to people who deal in that commodity.

Et per curiam, We are not so strict now as formerly: a stack of hay, a library of books, which are an *integer*, have been held well: this may be taken to be a bundle, and the plaintiff has particularised all the several sorts of goods of which it consisted. In 2 Sid. 175. there is a case cited of three packs of linen cloth and other goods, and held certain enough; which is more general than this case: and the case cited of the several sorts of spices goes as far as this. And therefore though all the cases are not to be reconciled, yet since there are cases which will make this good, we are of opinion to hold it well and affirm the judgment.

Mich. 4 Geo. 2. Haslegrave v. Thompson. Trover for 50 *peciiis materiae quadratae*, *Anglice* pieces of square timber wood: and held well on error (a). And judgment affirmed.

(a) After judgment by default, MSS.

Paternoster vers. Graham.

THE University of Cambridge claimed consufance, and produced the certificate of the Chancellor, that the parties were of the University. And upon the rule to shew cause it was objected, that the claim ought to be entred on a roll, and an affidavit to verify the certificate should be produced: and of that opinion was the court, and discharged the rule, and then it was too late to make a new claim.

What is necessary on claiming consufance (1).
1 L. Raym. 428, S. C.

(1) *Vide Boot v. Graham*, 1 Brooke, Cas. temp. Hard. 241.
Barnard B. R. 49. 65. *Hayes v. Leafingby v. Smith*, 2 Wils. 406.
Ang. 2 Wils. 310. *Woodcocke v.*

Wyatt vers. Winkworth.

AN attachment was granted against *Rolfe Bayley* an attorney, for not attending at the assizes upon a *subpoena* and tender his charges, whereby the plaintiff was nonsuited.

Attachment against a witness for not attending a trial.

Pas. 2 Geo. 2. attachment against one *Wyatt* for not attending *Japhet Crooke's* trial.

L. Raym. 1528.
1 Barn. B. R. 45. 67. S. C.
Barnes 33. S. C. and the cases there cited (1).

(1) *Hammond v. Stewart*, ante 510. and the cases there cited
de v. Whitmill, post. 1054.

Dominus Rex *vers.* Browne.

Order of ba-
stardy.
1 Sess. Ca. p.
329. no. 263.
S. C. but not
this point.

UPON an order of bastardy it was stated, that the husband had been absent six years, and that during his absence the defendant had had carnal knowledge of the wife, and therefore they adjudge him to be the putative father. *Et per curiam*, That order must be quashed, for his lying with her is not a sufficient reason to infer him the father of this child: and though the justices need not shew the grounds they go upon, yet if they do, and it appears no sufficient ground, their order will be bad.

Dominus Rex *vers.* Gumley et al^s.

Quinden' Trin.
is of a Sunday.
L. Raym. 1528.
1 Barn. B. R.
74. S. C.

THE *distringas* was returnable *die lune prox' post quinden' Trin.* And it was moved in arrest of judgment, that it should have been in *quinden' Trin'*, and the *dies lune prox'* is a week after the trial (1). But upon consideration and inquiry into the practice both on the crown and plea side, it was held to be right, and that the return day is of the Sunday, though the business is done upon the next day; and so is *Salk.* 626. 6 *Mod.* 250. 1 *Show.* 60. So there was judgment for the King.

(1) The facts and arguments as stated (by *Ld. Raymond*) are thus: The *distringas* was returnable Tuesday next after fifteen days of the Holy Trinity, and the day of *nisi prius* was Monday next after fifteen days of the Holy Trinity. Trinity Sunday was June the 16th, the Octave was Monday seven night being the 25th, the return of fifteen days after Trinity was Monday fortnight after Trinity Sunday, viz. Monday July the 1st. the day of *nisi prius*, therefore being the Monday next after the fifteen days &c. as that fell upon Monday, must have been Monday July the 8th, but

the *distringas* was returnable on Tuesday next after fifteen days, &c. viz. July 2d. and by consequence the day in bank was before the day at *nisi prius*, and this trial had July the 1st which was also before it. 33 H. 6. 45. *Dyer* 97. were cited to prove that a verdict taken after the day in bank was ill. But the court were of opinion that the *Quinden' Trinitatis* was of the Sunday, all octaves &c. being inclusive, that therefore Monday next after 15 days, was Monday July the 1st. and the trial right. 2 *Lord Raymond* 1528. In *Waldgrave's* case, 12 *Mod.* 607. S. P.

King et ux' vers. Jones.

THE plaintiff Jones declared in B. R. against Judith Parnell upon several promises. She by the name of Judith King appears by attorney, and pleads *non assumpsit*. And after a verdict for the plaintiff, she and Edward King bring a writ of error *coram vobis*, and assign for error, that she has appeared and pleaded as a *feme sole*, whereas at the time of her appearance and plea she was married to the said Edward King. The defendant in error pleads, that this Edward King and one John Kisson became bail for her as for a *feme sole*, and so relies on it by way of estoppel, that they shall not be admitted to aver against the record: to this the plaintiff in error demurs. And Strange argued, that the bail put in is by the name of King, so that the bail-piece is notice to the plaintiff: and besides it has been determined in the case of *Needham v. Dewaiver*, Mich. 2 Geo. 1. B. R. that the defendant cannot be estopped by the act of the bail; and so it was also held in B. R. Trin. 10 W. 3. *Fielding v. Villars*.

Coverture of the defendant after the action brought cannot abate the plaintiff's writ.
L. Rym. 1525.
1 Barn. B. R. 70. S. C.
1 Com. Dig. Abatement. (H. 42.) 20.

Ann 203.

And as to the coverture, he argued that it could not be pleaded in abatement, because it was not so at the bringing the plaintiff's writ; or if it might, yet her laches in not pleading it shall not deprive the husband of the benefit of assigning it for error: and so it was held Hil. 4 Geo. 1. B. R. *Howard v. Sedgemore*. And Trin. 12 Ann. (a) *Gravener v. Stevens*, Bro. Joinder en action 88. Error 173. and in 1 Roll. Abr. 759. pl. 10. it is assigned in the very same words as here.

[812]

(a) 10 Mod. 166.

Sed per curiam, This is to abate the plaintiff's writ by the act of the defendant, which was never allowed: we must take it that at the time of bringing the action the defendant was a *feme sole*, because they pretend to carry it back no farther than the appearance. And plaintiffs would be in a fine condition, if after they have arrested a woman she shall be allowed to overthrow their proceedings by a subsequent marriage. The judgment was affirmed.

Michaelmas Term

2 Georgii 2 Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice*,

Sir Francis Page, *Knt.*

James Reynolds, *Esq;*

Sir Edmund Probyn, *Knt.*

Sir Philip Yorke, *Knt. Attorney General*.

Charles Talbot, *Esq; Solicitor General*.

} *Justices.*

Barr *vers.* Satchwell.

Where a *scire feci*
is returned the
court will not set
it aside for want
of notice.
Vide a Term
Rep. 758. note.

A *Scire facias* was returnable on the general return day (which was Sunday) and not served till the Monday. On affidavit whereof Serjeant Whitaker moved to set it aside, the Sheriff having returned a *scire feci*. *Sed per curiam*, If that be a false return, the defendant will have his action against the Sheriff. But we will not try the truth of the return on a motion to set aside the proceedings.

Parker et al' *vers.* Godin.

What meddling
with the effects
of a bankrupt is
a conversion (1).
Bull. L. N. P.
47.

SATUR a bankrupt at the time of his going off, left some plate with his wife, who in order to raise money upon it delivered it to her servant, who went along with the defendant to

(1) *Vide Wilson v. Poulter*, post. 859. *Perkins v. Hughes*, 1 W. 328.

the door of Mr. *Woodward* the banker, and there the defendant took the plate into his hands and went into the shop and pawned it in his own name, gave his own note to repay the money, and immediately upon receipt of it went back to the bankrupt's wife, and delivered the money to her. And in trover for the plate the jury (considering the defendant acted only as a friend, and that it would be hard to punish him) found a verdict for the defendant. But upon application to the court a new trial was granted, upon the foot of its being an actual conversion in the defendant, notwithstanding he did not apply the money to his own use. And upon a second trial the plaintiff obtained a verdict for the value of the plate.

[814]

N. B. A difficulty arose upon the motion for a new trial, which was this. There were other things besides plate in the declaration, and as to them the verdict *pro def* was right; and yet a new trial must be granted upon the whole. But on consideration the court held that could be no reason to refuse a new trial, for if the merits as to those other things were with defendant, it would be found for him as to them (2). But it was agreed on all hands, that if one defendant be acquitted, and another found guilty, that defendant can have no new trial (3). *Strange pro quer*.

- (2) *Rex v. Poole* E. 1734. Bull. *Crabb's case*, 23 Geo. 2b. S. P. L. N. P. 326. S. P. *Fern's case*, Hil. 27 & 28 Car. 2.
(3) *Collier v. Morris*, Mic. 1b. *contra*. 1735. Bull. L. N. P. 326. *Cap.*

Bridges vers. Williamson.

THE condition of a bond was to pay 40*l.* by 5*l.* per annum; and the defendant had leave to bring the arrears of the 5*l.* per annum into court on the act for amendment of the law (1). *Ante* 515. *contra*. *Strange pro def*.

Bringing money into court.

Hil. 4 Geo. 2.

Mayn v. Somers the court made the same rule to bring in only the arrears.

3 Burr. 1314.

- (1) *Bonafens v. Rybot*, 3 Burr. 1370. *acc.*

Hopman *vers.* Barber.

Officer must
obey writ though
fees unpaid.

ON a motion against *Bambridge* the warden of the *Fleet*, it was held that if a *habeas corpus* is brought, he must obey it, though the party refuses to pay his fees; for he has a remedy for them (1).

(1) *Crompton v. Ward*, ante 433. opinion of *Fortescue J.* *videtur contra, sed vide.*

Moore *vers.* Jones.

Action of cove-
nant must be
brought upon a
deed (1).

5 Com. 618.

Per scriptum fac-
tum apud W.

concessit does not
import a deed,
neither does an
allegation that
the party cove-
nanting *per quod-*
am scriptum. If
the instrument
is set out upon
error and con-
cludes with,

In witness
whereof I have
hereunto set my
hand and seal, it
will not make
good this defect
in the declara-
tion (2).

L. Raym. 1536.
more full.

1 Barn. B. R.
62, 85. S. C.

[*815]

ERROR of a judgment in *C. B.* in an action of covenant, wherein the plaintiff declared, that the defendant *per quod-*
dam scriptum suum factum apud Westm' concessit to the plaintiff an
annuity *pro concilio impendendo*, and assigns the breach in non-pay-
ment for a certain time. (3). Upon *oyer*, which was set out in
hec verba, and concluded with, *In witness whereof I have here-*
unto set my hand and seal; the defendant pleaded, that during that
time the plaintiff gave no counsel; and on demurrer there was
judgment by default for want of a joinder (4), and in *B. R.*
general errors assigned.

**Robinson pro quer' in errore* objected, that the plaintiff had not
in his declaration intitled himself to an action of covenant it not
being shewn that the grant was by deed, without which cove-
nant will not lie. 3 *Leon.* 192. *Cro. Car.* 180, 209. Here is
no *sigillo suo sigillat'*; and the word *factum* here must be taken to
be an adjective, to make sense of the words *apud Westm'*: an
assumpsit indeed might lie upon such a writing. *Cro. El.* 117,
571. 3 *Lev.* 234.

(1) 3 *Com. Dig.* (A. 1.) 256.

(2) 5 *Com. Dig.* Pleader
(2. V. 2.) 618.

(3) It was argued that the
breach for non-payment was ill
assigned, but the court gave no
opinion upon the point. See the
breaches set forth. 2 *Ld. Raym.*
1535.

(4) Another error was assigned
that the reason of the judgment
in *C. B.* was because the plaintiff

in error and defendant below, did
not join in demurrer, and yet
judgment was given against him
as upon default, which could only
be when a day was given him;
but no day was given him here,
and therefore the judgment should
rather have been entered as upon
a *nil dicit*, but upon this point
likewise the court delivered no
opinion.

Huffey contra. The *oyer* must be taken as part of the declaration, and by that it appears there was a sealing (5). The words *convenit et concessit* imply a deed. 2 *Vent.* 106, 150. *Palm.* 173. 4 *Leon.* 173, 175. 2 *Roll. Rep.* 228. 1 *Lutw.* 333. *Godb.* 125. *Cro. Car.* 209. *Cro. Jac.* 420. *Cro. El.* 737. 2 *Lutw.* 1667. In 5 *Co.* 51. *b.* it is said, a pension cannot be without a deed; and why then shall not it be implied of an annuity? *Pas.* 8 *Geo.* *Atkinson vs Coatsworth*, per *indenturam convenit* was held good. *Ante* 512. The word *conventio* is a technical word, and the *Register* is only *quod teneat conventionem*. The *oyer* may be taken either as part of the declaration or plea. *Cro. Jac.* 670. *Caribew* 513. And the plea of *non impendit consilium* admits the deed so far that in evidence it need not be proved. *Cro. Jac.* 682, 124. *Cro. Car.* 209.

C. J. None of the cases come up to this, where the word *factum* by being joined to *apud Westm'* renders it impossible to be taken as a substantive. *Convenit* in a declaration would never do alone; and though it is alone in the *Register*, yet that is only a short description of the nature of the cause, to be explained more at large when the plaintiff comes to count upon it. I do not see the plea has made it good.

Page J. If *scriptum* does not signify a deed, (as no body will pretend it does) here is nothing else to import it: the *oyer* does not prove it was actually sealed, for every body knows the words *In witness, &c.* are in the instrument before it is so much as signed by the party. And indeed *oyer* of a sealing was never heard of before.

Reynolds J. I think this declaration is not to be maintained. Anciently the words *sigillatum et deliberatum* were required. But now it is held well enough to call it *factum, indentura, scriptum indentatum*, which imply the circumstances of sealing and delivery. A *concessit solvere* lies in *Bristol*, and yet the word *concessit* does not imply a deed. Nor is there any thing in the plea which makes the declaration to be better than upon the face of it. *Ante* 512.

Probyn J. I do not think *convenit* a better word than *promisit*, or if the circumstances of sealing and delivery were shewn, *promisit* would be well enough. The word *scriptum* alone will not make it to be a deed, and there is nothing else left to imply it. *per curiam*, The judgment was reversed. [816]

(5) See this point argued at large, 2 *Lord Raymond*, 1540.

Dominus Rex *vers.* Robertum Hales.

Criminal prosecution carried on at expence of private prosecutor not triable *de jure* at bar otherwise where there is an authority from the King to prosecute.
1 Barn. B. R. 82, 112. S. C.
Vide ante 644. post. 826.

MR. Attorney moved for a trial at bar on an information filed by him for forgery. But it not being carried on at the expence of the crown, but of a private prosecutor, the court held that he must make out the usual requisites to bring it to the bar. So the motion was denied. And at another day Mr. Attorney moved on an authority from the King to prosecute, and it was granted as of right to the King in his own cause. And in *Hil. sequen'* it was tried, and the defendant convicted. And in *Trin. sequen'*, being called to judgment, he produced a pardon, which was allowed; and being only for a misdemeanor, he was not put to go the bar, or plead it upon his knees.

Smith *vers.* Mason.

Addition.
L. Raym. 1541.
S. C.

THE defendant was sued by the addition of Gentleman; and pleaded in abatement, that he was a merchant and not a Gentleman. And on demurrer a *respondes ouster* was awarded. For the plaintiff has his election to sue him either by a name of degree or mystery, and the plea in abatement should give the plaintiff a better writ as to that particular sort of addition whereon he chuses to proceed (1).

(1) *Robinson v. Mead*, Com. Rep. 371. *Contra*, ante 556. R. acc.

Dominus Rex *vers.* Upton,

Indictment lies not barely for a corrupt agreement.
2 Sess. Caf. p. 247. no. 168.
1 Barn. B. R. 97. S. C.

AFTER a verdict *pro rege* on an indictment for usury; *Strange* moved in arrest of judgment, that they had only laid a corrupt agreement, without any loan or taking excessive interest in pursuance of it. And the judgment was arrested.

Garnham *vers.* Bennett.

Where master and owners of a ship are both liable for repairs.
1 Barn. B. R. 96.

ON a motion for a new trial, it was held, that *prima facie* the repairer of a ship has his election to sue the master who employs him, or the owners: but if he undertakes it on a special promise from either, the other is discharged (1).

(1) *Farmer v. Davies*, 1 Term Rep. 108. S. P.

Ereskine vers. Murray.

IN case upon a bill of exchange against the acceptor, it was alleged generally, *quod acceptavit*. And on demurrer to the declaration exception was taken, that by 3 Ann. c. 9. the acceptance must be in writing, and therefore this ought to be alleged to be so. *Sed per curiam*, *Acceptavit* is enough, and if writing is necessary, it will be implied (1). Besides, the writing required by the statute is only in order to make the drawer liable to damages and costs. The plaintiff must have judgment.

3 Ann. c. 9.
Need not aver
the acceptance of
a bill was in
writing.
L. Raym. 1542.
1 Barn. B. R.
87. S. C.
Both reports
fuller and con-
taining other
exceptions.

(1) That it is not necessary *vide Lumley v. Palmer*, *post*. 1000. and the cases there cited.

The Case of Landen Jones.

HE was committed for a contempt, and moved to have the benefit of the rules, which was denied. And *Trin. sequent* Capt. *Hayer*, who was in execution for a forgery, and was to lye a year according to the statute, made the same motion, and had the same answer (1).

One committed
for a contempt
cannot have the
benefit of the
rules.
L. Raym. 1518.

(1) *Post*. 845. *Rex v. Kinnerley*, *ante* 196. *Fowles v. Dineley*, *post*. 1122.

Palmer vers. Ekins.

Intr. Trin. 11 Geo. 1. rot. 347.

COVENANT by the plaintiff as assignee of *John Palmer*; and declares, that 27 March 1716. *J. P.* was seised in fee of the demised premisses, and by indenture between him and the defendant he the same day demised to the defendant, to hold from *Lady-day* before for twelve years, at 18 *l.* *per annum*, payable quarterly; that defendant covenanted to pay the rent, and entered and enjoyed the house to *Lady-day* before bringing the action: that *John Palmer* being seised of the reversion, 22 & 23

A plea by lessee
that the lessor
made a convey-
ance in fee be-
fore the lease
with a traverse,
that he was af-
terwards seised
in fee is a speci-
al, *nil habuit ten-*
ementii. Where

the lease is by indenture the lessee is estopped from so pleading even in covenant by an assignee of the lessor. It is also ill for the generality of the traverse, as it ties plaintiff up to prove an estate in fee, when any other would do. As a plea of *nil habuit*, &c. it may be taken advantage of on general demurrer, Barn. B. R. 10. S. C.

November,

November, 10 Geo. by indentures of lease and release between him and the plaintiff sold the reversion to the plaintiff and his heirs, of which the defendant had notice, and then assigns the breach in non-payment of rent. The defendant, *protestando* that John Palmer did not demise, for plea says, that 19 November 1706, the said John Palmer was seised in fee of the demised premises, and by lease and release of 19 & 20 November 1706, sold the same to John Brag and his heirs; and traverses, that at any time after the date of the last mentioned release John Palmer was seised in fee as the plaintiff has alleged. To this plea the plaintiff demurred generally, and the defendant joined in demurrer. And after several arguments at the bar, these points were resolved by the court.

[818]

1. That the demise being by indenture, the defendant could not plead *nil habuit in tenementis*: and indeed this point was not disputed by the counsel on either side, but was taken for granted throughout the argument of the case (1).

2. That the defendant's plea was a special *nil habuit in tenementis*, and was therefore no more to be received than a general one: the plea is of a seisin in fee in Brag ten years before the demise to the defendant: that fee being alleged must in pleading be taken to continue, unless the contrary appears: nothing appears to the contrary; and consequently it is saying that John Palmer had no estate in the premises at the time of the demise, the whole estate in law being in another. Besides, there is no room to suppose a reconveyance from Brag, because the defendant has alleged in the traverse, that after John Palmer had once parted with the estate out of him, he was never after seised.

Dec. acc.
T. Jones, 182.

Where estoppel appears on the record, it need not be replied.

Ante 610.

An assignee may take advantage of an estoppel.

3. That this estoppel needed not to be replied, but might be taken advantage of upon a demurrer; and that has been the usual way of answering the plea of *nil habuit in tenementis*, Salk. 277. And so is the general rule of pleading in Co. Litt. 303. so it was done in Cro. Eliz. 362. and in the case of Skipwith v. Green, Mich. 11 Geo. in B. R.

4. That though the plaintiff was an assignee, he might take advantage of the estoppel, for it runs with the land. Co. Litt. 152. 4 Co. 53. Salk. 276. 1 Roll. Abr. 868. L. 2.

(1) Kempe v. Goodall, L. Raym. 1154. Salk. 277. 3 Lev. 146. S. P. ante 611. But this estoppel exists only during the tenant's occupation. Hayne v. Maltby, 1 Term Rep. 441. Per om' Juss.

5. That

5. That this was ill on a general demurrer. And

6. That if the plea did not amount to *nil habuit in tenementis*, yet it would be ill on account of the generality of the traverse, which ties up the plaintiff to prove the estate alleged in the declaration, when any other estate would do; even a disseisin would in this case, where it appears the tenant enjoyed under the lease. 2 Vent. 67. And it is no answer to say, that the defendant has traversed in the words of the declaration; for unless it be materially alleged, he is not to follow it. And so it was determined in this court in the case of *Colborne v. Stockdale*, ante 493. The plaintiff had judgment. *Strange pro quer*.

Ovington, *vers.* Neale.

[819]

Idem vers. Waller.

THE plaintiff declared upon a promissory note, by which the defendant and one *A. B. conjunctim aut separatim* promised to pay. There was a verdict and judgment in *C. B.* for the plaintiff. But upon error the judgment was reversed for want of the plaintiff's shewing a title to bring a separate action against one of the makers of the note, for by the present declaration he only says he has this or some other cause of action. *Strange pro quer* (1).

A joint or several note how to be declared on.

2 L. Raym. 1544. S. C.

(1) *Butler v. Maliffy*, ante 76. acc. *Rees v. Abbot*, contra *Cowp.* 332.

Bowers *vers.* Mann.

ON error *e C. B.* the *placita* was of *Mich. 13 Geo.* and the judgment was of the same term: the writ of error was tested 18 Oct. *primo Geo. secundi*, and the assignment of errors was of the *Trinity* term following: to verify the error as to want of an original, the plaintiff took out a *certiorari, teste* 21 June *Geo. 2.* upon which there was a return, that there was no original; and the defendant in error upon that pleading *in nullo est erratum*, *Strange pro defendente in errore* objected, that the error was not verified, for the late King died 11 June, and there-

Errors are not verified by a *certiorari, teste* before the writ of error (1).
L. Raym. 1554.

(1) According to the report in *L. Raym.* the ground of affirmance was, merely that the *certiorari* was *teste* prior to the assignment of errors, and therefore could not be a *certiorari* to verify the errors upon that assignment. *Vide Beller v. Scott*, ante 440.

fore

fore the *teste* of the *certiorari* being the 21 of *June primo* of the present King, and the writ of error in *October primo*, makes it to be four months before the bringing the writ of error, and a year before assignment of errors; the consequence of which is, that it cannot be taken as verifying the errors; nor indeed to be the *certiorari* which the court awarded, for they awarded one *after* the error was assigned, and this appears to be another taken out before.

No second *certiorari* to reverse a judgment.

The court thought the objection good, and affirmed the judgment; after they had refused a second *certiorari*, because it was in order to reverse a judgment: according to the case of *Morrifield v Berry*. Ante 765.

Lord Bruce's Case.

No *quo warranto* for a forfeiture by non attendance.

[820] AN information in *natura de quo warranto* was moved for against him, upon a forfeiture of a recorder's place, by not attending; there being no clause in the charter empowering the corporation to remove. *Sed per curiam*, If it is an actual forfeiture, he is out, and you may chuse another (1): if not, it is but a misdemeanour, and a *quo warranto* will not lie. Besides, the modern opinion has been, that a power of amotion is incident to the corporation (2), though *Bag's* case seems contrary. 11 Co. 93.

(1) *Vide Reg. and the bailiffs of Ipswich*, 2 L. Raym. 1233. Saik. 443. S. C. That it is a cause for which he may be amoved, but it must be a general neglect and not a single omission. *Rex v. Corporation of Wells*, 4 Burr. 1999. 1 Hawk. P. C. c. 66. f. 1. p. 310.
(2) *Rex v. Richardson*, 539. *Rex v. Mayor &c. Lyme Regis*, Doug. 159. S. P.

Leglise *vers.* Champante.

At Guildhall.

Where probable cause is not sufficient.
19 Geo. 2. c. 34.
§ 16.

THE plaintiff brought an action against the defendant, who was a custom-house officer, for seizing several hogshheads of French wine, upon pretence of their being lees, which upon an information in the Exchequer had been determined against the officer. And now upon debate it was held, that in the

cases the officer seizes at his peril, and that a probable cause is no defence (1).

It appeared on the evidence, that the plaintiff had a partner in these wines, who was no party to the action. And the Chief Justice held, that if it was in an *assumpsit*, it might be taken advantage of at the trial, for it would not be the same contract (2); but it ought to be pleaded in abatement in the case of a tort.

Where another partner must be pleaded in abatement.
Bull. L. N. P. 152.

- (1) 12 Vin. 173. (P. l. 6.) *ner*, the partnership must be pleaded in abatement, and cannot be given in evidence. *Rice v. Shute*, 5 Burr. 2611.
(2) Bull. L. N. P. But in an action of *assumpsit* against one part-

Page vers. Page. In Canc.

A. Devises to his six relations *C. D. E. F. G. H.* all his lands, &c. and all his personal estate, in trust, to perform his will, and after all these things discharged, directed that the remainder should be equally divided amongst them, share and share alike, and made his said six relations executors (1).

C. one of the legatees died, and then *A.* the testator died. *Quere*, whether the share of *C.* dying in the life-time of the testator should go to the surviving residuary legatees, as part of the *residuum*, or whether, in this case, it should go to the next of kin of the testator, as so much of his estate undisposed of?

Mr. Solicitor General argued, that where there is a lapsed legacy, it falls into the *residuum* of the personal estate generally; but here a part of the *residuum* itself is the lapsed legacy, and consequently undisposed of, and ought to go to the next of kin of the testator; for the executors are to take nothing as executors, but as residuary legatees; and *C.* dying in the life-time of the testator, his share must go according to the statute of distributions, as undisposed of. And so it was decreed.

A. by will directs that the remainder of his real and personal estate should be equally divided amongst his six relations share and share alike, and he makes them his executors, one of the legatees dies in the life of the testator, his share of the personal estate lapses.
2 Will. Rep. 489.
Moll. 42. S. C.

- (1) According to the report in *Wms.* the devise was "to each of them a sixth part." But the report in *Mysley* agrees with the present. *Vide Man v. Man*, post.
5. *Bagwell v. Dry*, 1 P. Wms. 700. *Owen v. Owen*, 1 Atk. 494. *Holderne's v. Reyner*, cited ib. *Peat v. Chapman*, 1 Fex. 542. *Akroyd v. Smithson*, 1 Bro. Chan. Caf. 503. acc. *Hunt v. Barkley*, Moll. 49. 1 Atk. 496. contra.

Hilary Term

2 Georgii 2. Regis. In B. R.

Sir Robert Raymond, Knt. Lord Chief Justice.

Sir Francis Page, Knt.

James Reynolds, Esq.

Sir Edmund Probyn, Knt.

} *Justices.*

Sir Philip Yorke, Knt. Attorney General.

Charles Talbot, Esq. Solicitor General.

Gomez Serra *vers.* Munez.

Upon a bond
bail justify as to
double what is
really due.

Jews allowed
to cover when
they swear.

4 Ann c. 16.

The court of
Exchequer
Chamber may
try a release.
Moll. 93. 106.
113. 3. C.

UPON error in debt upon a bond, the bail is to be bound in double the penalty recovered (1), but by the course of the court it is sufficient if they justify in double what is really due. The bail in this case, being both *Jews*, were suffered to put on their hats while they took the oath.

The next day the defendant in error moved the court of Chancery for a *superfedeas* to the writ of error, on an affidavit that he had a release of errors, which he could have no benefit of in the Exchequer Chamber, for want of a power in that court to try

(1) In error on a judgment in debt upon a bond it was insisted, that the bail ought to justify in double the sum, judgment was given for; but the court held it

sufficient if they justified in that sum, it being double the debt really due. *Moore v. Lynch*, 1 *Wils.* 213.

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VOL.

the release. To which it was answered by the counsel for the plaintiff in error, that it was a vulgar error to imagine they could not try it, the statute 27 *Eliz. c. 8.* having given them power to examine all errors, and thereupon to reverse or affirm as the law shall require: and it was the highest absurdity to imagine a court to be so constituted, as to be obliged to reverse a judgment for an error which the party (having given a release) has no right to assign: Besides, the notion that they cannot try a release, proceeds from confounding the case of a release of errors with that of assigning error in fact, and taking up with a wrong reason why a man cannot assign error in fact, and concluding from thence that he cannot plead a release. The wrong reason that has been given is, that they have no power to award a *venire* to try the error in fact; but the true reason is, that the statute of *Eliz.* was only to give a new remedy where there was none before: now before the statute the King's Bench did, and still does, examine their own errors in fact upon a writ of error *coram vobis*; and it never was the intent of the statute to take away the jurisdiction of the King's Bench, but only to give a new one in the instances where it was wanted. *Et per King* Lord Chancellor: I think it is a great absurdity to imagine, that the court that is to hold plea on the writ of error should not have power to do justice by giving the party the benefit of his release: I think they may try the release, and award a *venire* under the seal of the court of Exchequer; and if they may, I can see no reason why I should deprive the party of the benefit of a trial by a jury, by inquiring into the validity of this release upon a motion to supersede the writ. I will make no order in the case. *Strange pro quer' in errore.*

[822]

Burroughs *vers.* Willis.

UPON a motion to change the venue from *Middlesex*, it was insisted, that the plaintiff was a master in Chancery, and a barrister at law, and therefore had a privilege to lay his action in *Middlesex*; and a case was cited in *C. B. Hil. 9 Geo. 2. Licks v. Foot*, where it was so held, and the case of *Carter v. Farmer* (a) in *C. B. Trin. 13 Geo.* and *Salk. 668.* and now upon consideration the court refused to change the venue, but declared they did it on account of his being a barrister, and not as master in chancery (2).

Barrister may lay the venue in *Middlesex* (1).
L. Raym. 1556.
1 Barn. B. R. 214.
Fitzg. 40. S. C.
(a) Co. Ca. of Prac. 33.

(1) The report in *Fitzg.* states the ground of refusal to be that the plaintiff was a master in chancery.

(2) *Spelman v. —* 1 *Wils.* 159. *S. P. et vide Pope v. Redfearne*, 4 *Burr.* 2027. and the note by Sir James Burrough.

Bowington *vers.* Parry.

Laced head cannot be brought into court.

IN trover for a laced head, *Strange* moved to bring it into court, but was denied (1).

(1) *Olivans v. Perineau*, *post*. 1191. S. P.

Goodchild *vers.* Chaworth.

Capias ad satisfaciendum against bail, *giff.*
1 Barn. B. R.
326. S. C.

A *Capias ad satisfaciendum* was taken out against bail on a writ of error, and the court refused to set it aside: though 1 *Roll. Abr.* 898. 3 *Salk.* 286. is, that it will not lie. *Strange* for the bail.

[823]

Ferguson *vers.* Cuthbert.

No prohibition for *strumpet*.
Bunb. 260. S. C.

A Prohibition was moved for to a suit in the spiritual court for calling a woman *jilt and strumpet*, and saying *he would cut his wife's legs off if she was such a strumpet*. And denied, for *per Cur.* they are a charge of incontinence, and the signification of them well known (1).

(1) *Cook v. Wingfield*, *ante* 555. S. P. et *vide* *Hodgkins v. Corbett* *ante* 545.

Hunter *vers.* Wiseman.

Where a prior recovery in the same court is pleaded, *oyer* must be given.
(a) 1 Barn. B. R.
380.

THE defendant pleaded a recovery in *B. R.* and instead of replying *nul tiel record*, the plaintiff obtained a rule for the plea to be rejected, unless *oyer* was given of the judgment; according to *Carthew* 453. 517. it being a record of the same court. *Trin.* 3 Geo. 2. *Gwinnet v. Thompson* (a) the same rule.

Fox *vers.* Glasf.

Practice.
Salk. 518.

THE court had long refused to set aside a judgment which was regular, on putting the plaintiff in as good a condition. But upon pressing the practice of *C. B.* I broke through it in this cause, and now they do it every day.

Ford *vers.* Fleming.

In Canc. coram King Lord Chancellor.

THE case was this. *Jane Fleming* made her will in this manner as to the matter in question.

"Item, I give and bequeath to my granddaughter the sum of 40 *l.* being part of the debt due and owing from *G. Maxton* for rent, she allowing the charges in getting in the same. Item, I give the rest and residue of what is owing to me from said *Maxton*, which is about 40 *l.* more, to my two grandsons to be equally divided between them, allowing the charges as aforesaid. And then by a codicil she orders, that her executors, or whomever it should concern, should take no more of *G. Maxton* than what would answer the charges of getting in the said debt."

She gives by will 40 *l.* to her granddaughter being part of a debt due and owing for rent, she allowing the charges for getting in the same, the testatrix afterwards recovers the debt, this is an *ademption* of the legacy. Abr. Ca. Eq. 302. pl. 3. 2 Will. Rep. 469.

Before the testatrix's death she recovered the debt; and the single question was, whether this was an *ademption* of the legacy or not.

[824]

Lord Chancellor, It is not: this is a devise of a particular sum of money; and the debt is only appointed as the fund, out of which it is to arise. *Raym.* 335. there is a distinction taken, where a debt is devised, the receipt in that case by the testator would be an *ademption*. But where a sum is devised payable out of a debt, the receipt of that debt is no *ademption* (1).

(1) A distinction has been relied upon that where the testator himself calls in the debt it shall be an *ademption* of the legacy, but that it otherwise where the debtor has paid it in uncalled for, in *Orm v. Smith*, 1 Eq. Ca. Abr. 302. pl. 1. *Crocket v. Crocket*, 2 P. Wms. 105. *Ryder v. Wager*, 340. *Birch v. Baker*, Moss. 373. *Partridge v. Partridge*, Ca. Temp. Talb. 228. But this difference has been held

immaterial in *Earl Thomond v. Earl Suffolk*, 1 P. Wms. 464. *Ashton v. Ashton*, 3 P. Wms. 386. *Drinkwater v. Falconer*, 2 Vez. 623. *Attorney General v. Perkin*, Amb. 566. *Hambling v. Lister*, ib. 401. *Asburner v. Macguire*, 2 Bro. Cha. Rep. 108. *Humphreys v. Humphreys*, in Chan. 24 July 1789. *Coxe's P. Wms.* 330. n. 1. where these cases are collected.

Dominus Rex *vers.* Roger' Johnson.

Outlawry for reason reversed on defendant's showing in within the year. In a capital case the court will not appoint a trial at bar unless the defendant is present.

1 Barn. B. R. 79, 90, 91, 95, 103, 111, 123. Fost. C. L. 46.

B. B. Mr. Attorney General allowed at the bar that this case admitted of a distinction from Sir T. Armstrong's case, because here the defendant brought the first *habeas corpus* at his own instance, and offered at the return to surrender to the Chief Justice; in the other the *habeas corpus* was *pro rege*, in order to have execution awarded.

[*825]

THE defendant in April 1727. was committed to *Newgate* for high treason in diminishing the coin; and upon 17 June, before he was indicted, he made his escape: upon 11 June 1728. he was retaken at *Newcastle*, having during his absence, viz. 3 July 1727, been indicted for high treason, upon which process issued against him in order to outlaw him, and 8 February after (which was the February before his being retaken) he was declared outlawed. He was brought up to *Newgate*, and in the beginning of *Michaelmas* term last moved for a *habeas corpus*, by virtue of which he was brought to the court, and desired the benefit of a trial, according to 5 & 6 E. 6. c. 11. he now surrendering himself to the Chief Justice, and offering to traverse the indictment, having been beyond sea at the time of the outlawry, and being still within the year. The outlawry not being removed, the court said they could only make a minute of his prayer, and ordered a *certiorari* to remove the proceedings from the *Old Bailey*, and that the defendant should be brought up again upon the return of it. When the *certiorari* was returned, the court made little difficulty of allowing him the benefit of the statute, though it was mentioned, but not much insisted upon, by Mr. Attorney, that it was not a voluntary render, but a compulsory recaption, and therefore not within the act, according to Sir Thomas Armstrong's case, Vol. 3. *State Trials* 334. But the court seemed very unwilling to hear any thing of that case; saying it was very hard, when the law had given a man a year to come in, that by taking him up before the year was out, the benefit of that law should be taken from him, if he could bring himself within the description of it. Whereupon being asked what he had to say why execution should not be done upon him; he delivered in a plea in *Latin*, and ingrossed on parchment stamp, setting forth that he being *ductus ad barram* did surrender himself to the Chief Justice, and offered to traverse the indictment; and as to the outlawry he pleaded, that at the time it was pronounced, and long before and after, he was resident beyond sea out of the dominion of his Majesty, viz. *apud Flushing* in *Zealand*, under the dominion of the States General, whereby he was disabled to render himself; and avers the identity of his person, and the high treason for which he was committed and indicted and outlawed, and prays judgment, if upon that outlawry the court will proceed any farther against him. And as to the high treason he pleads Not guilty. Upon putting in this plea Mr. Attorney desired a copy of it, and time to consider it; and the next day the defendant being brought up again,

Mr. Attorney objected, that he should not have pleaded to the indictment, till his other plea of being beyond sea was determined; and it being taken notice of, that in *Sir Tho. Armstrong's* case it was pleaded *ore tenus* at the bar, the court thought it would be better that the defendant should take back the plea: and Mr. Attorney consenting, the plea was delivered back, and he ordered to be brought up again on 25 *November*, and notice to be given to the sheriff, to be prepared with a jury.

1 Sid. 72.
1 Lev. 61.
Kelyng. 13.
1 Keb. 244.

It was debated, whether he could not at the same time, if he was found to be beyond sea, be called upon to plead to the indictment, and try that issue also at the same time: but upon consideration, it was found he could not, because till his being beyond sea was found, he could not plead; and after his plea there must be fifteen days between the *teste* and return of the *verdict*, it being an indictment removed by *certiorari*.

It was debated likewise, whether in case it was found for him as to this plea, the indictment could not be sent back to be tried at the *Old Bailey*: but upon looking into the act 6 H. 8. c. 6. it was found to extend to felons and murderers only, and not to treason.

Upon the 25th of *November* he was brought up: and without making any notice of the former proceedings, the outlawry against him was read, and he was called upon to know what he had to say, why execution should not be awarded: upon which he pleaded *ore tenus* his being beyond sea at the time of the outlawry pronounced; and the Attorney General *instantanter* replied *ore tenus*, that he was then within the realm, and traversed that he was beyond sea according to his plea, and offered an issue upon which the defendant thereupon said he joined issue, and the jury came instantly to the bar and were sworn (1). And then *strange pro def* (for it was agreed he was to have counsel as to fact and law both, in this collateral issue, though not on the indictment itself, the offence as to the coin being excepted out of the statute of King *William 3.*) opened the issue; and several witnesses were examined, to prove him beyond sea: and after the King's counsel had been heard, and examined their witnesses; the prisoner's counsel replied, and afterwards the evidence was summed up; and the jury found the issue for the defendant.

Q. 1 Keb. 244.

[326]

Upon bringing in this verdict the defendant was immediately arraigned, and pleaded Not guilty. And he was ordered to be

(1) *Vide Rex v. Davis*, 1 Burr. 638. *Ratcliff's case*, *Foss. Cr.* 41. 1 *Black. Rep.* 3.

tried at the bar the next term. Upon the first day of which the Attorney moved the court to appoint a day for trial; but the defendant not being at the bar, the court would make no rule, it being a capital case. And he was the next day brought to the bar, and then the time for trial was fixed; and upon the evidence the defendant was acquitted.

Baldwin *vers.* Morgan.

Equitable costs cannot be levied out of the penalty of a recognizance of bail. *v. Barnard. B. R. 125. S. C. with some difference.*

THE plaintiff out of the penalty of a recognizance of bail levied not only the money recovered, but some costs, not included in the judgment, but such as he had really been put to: and upon motion it was held, that though equitable costs may be levied out of the penalty of a bond, yet it was too hard to suffer it to be done against the bail: and so the overplus money was ordered to be returned. *Strange pro quer'.*

Searle *vers.* Lord Barrington.

The indorsement of interest being paid within twenty years, shall be given in evidence though under the hand of the obligee. *L. Raym. 1370. 3 Med. 278. 3 P. Wms. 297. note [D] 1 Bro. Par. Ca. 335. S. C.*

THE plaintiff brought an action on a bond entred into to her husband by one *Wildman*, under whom the defendant claimed, and the bond was dated 24 June 1697. The defendant pleaded *solvit ad diem*, and relied upon the presumption, it being after twenty years (1): to encounter which the plaintiff at the first trial of the cause, which was in *Trin. 10 Geo. 1.* offered to give in evidence the indorsement of interest under the hand of the obligee in the year 1707 which was three years before the death of the obligor: but *Pratt C. J.* before whom it was, being of opinion it ought not to be given in evidence, from the danger of letting the obligee make indorsements, which might be done at any time; the plaintiff was nonsuit, and afterwards moved the court against the opinion of the Chief

(1) That the lapse of 20 years without any demand or payment upon a bond shall, in itself, form a presumption that it has been discharged. *Vide Moreland v. Bennet, ante 632. Flower v. Bolingbroke, ante 638. In the Winchelsea causes, 4 Burr. 1963. Forbes v. Wale, 1 Black. 532. Oswald v. Legh, 1 Term Rep. 270. In which last case, and in Rex v. Stephens, 1 Burr. 434. it is said*

by Lord Mansfield that the time in which a bond shall be presumed satisfied, is not fixed to 20 years, it may be in 18 or 19. *Buller J.* takes this distinction, that 20 years shall in itself form a presumption, but in less time payment shall not be presumed without other evidence in favour of the presumption. *Oswald v. Legh, 1 Term Rep. 272.*

Justice

Justice; and upon debate the other three Judges were of opinion, it ought to have been left to the jury; for they might have reason to believe it was done with the privity of the obligor, and the constant practice is for the obligee to indorse the payment of interest, and that for the sake of the obligor, who is safer by such an indorsement, than by taking a loose receipt. But an objection arising, that after a nonsuit the plaintiff was out of court, and could not have a new trial, no rule was made, and she was left to bring a new action (2).

[327]

Accordingly a new action was brought and tried at *Guildhall* before Chief Justice *Raymond*, who suffered the indorsement to be read, and the jury found for the plaintiff. The defendant tendered a bill of exceptions, which was sealed: and after judgment for the plaintiff, a writ of error was brought in the Exchequer Chamber, and the bill of exceptions returned as parcel of the record. And upon argument Chief Justice *Eyre*, Chief Baron *Pengelly*, *Denton*, *Hale* and *Price* were of opinion to affirm; and *Carter* and *Comyns* to reverse. So the judgment of *B. R.* was affirmed this term (3).

In *February 1730*, this judgment was affirmed in Parliament.

Hil. 13 Geo. 2. B. R. Turner v. Crisp, the Chief Justice refused to let the indorsement of a receipt of part of the bond, after the presumption had taken place, to be given in evidence; saying it differed from this case, where the indorsement appeared to be made before it could be thought necessary to be made use of to encounter the presumption (4).

(2) But it is now settled that a new trial may be granted where the plaintiff is nonsuited through a mistake of the Judges in point of law. *Sadler v. Evans*, 4 Burr. 1986. in *B. R. Temple v. Wells*, and *Bagshaw v. Wynn*, cited *ib. Harris v. Buttercy*, *Corp.* 483. *Mewburn v. Langley*, 3 Term Rep. 2. *Mascall v. Hogg*, 3 Wils. 146. *Rackham v. Jessup*, *ib.* 332. S. P. in *C. B.* See also *Forbes v. Hale*, 1 Black. 532. in *B. R. Love v. Day*, *Barnes* 311. *Hartley v. Atkinson*, *ib.* 317. *Contra* in *C. B.*

(3) How far entries in private books are evidence to affect the interest of third persons. *Vide Warren v. Greenville*, *post* 1129.

(4) In *Barnes v. Ransom*, 1

Barnard. B. R. 432. a similar indorsement seems to have been admitted, though made after the presumption had taken place. But in *Glyn v. The Bank of England*, 2 Vez. 43. Lord Hardwicke took the same distinction as was done in the present case. In a copy of *Select Cases of Evid.* 152. (where this case is also reported) formerly in the possession of the late Mr. J. Wilson, and now in that of the editor, it is stated that "at the Sittings after Michaelmas term at Westminster 6 Geo. 3. Lord Camden said, that he was never much pleased with the determination of *Searle v. Lord Barington*, however he said it was law."

Emery *vers.* Barlett.

In an action upon an account stated, the items need not be laid to have become due *infra jurisdictionem* in an inferior court.

(1)

L. Raym. 1555.

1 Barn. B. R.

128. S. C.

L. Raym. 795.

1040.

Rep. also 6 Mod.

223.

Holt 13.

Balk. 404.

UPON error out of the court of *Litchfield* it was objected, that the *items* of a stated account were not laid *infra jurisdictionem*. But the court held it enough to lay the account to be stated within the jurisdiction; and that as a *venue* was not necessary to be laid as to the *items*, there was no occasion to aver them to have arisen within the jurisdiction. Cases cited were *Davis v. Stanyard*, Mich. 3 Ann. for immoderate riding and whipping a horse, and held the whipping need not be laid *infra jurisdictionem*. *Lutw.* 256. 261. 15 E. 4. 4. *Hob.* 88. 1 *Saund.* 73. *All.* 72. *Sti.* 132. 2 *Lev.* 165. 2 *Jon.* 47. *Mod. Ca.* 223. The judgment was affirmed.

(1) *Vide Trevor v. Wall*, 1 Term Rep. 151.White *vers.* Graham.

Trover for a parcel of diamonds.

(1).

Ante 809.

2 L. Raym.

1530.

[828]

ERROR of a judgment *e C. B.* in trover for a parcel of diamonds. And *Strange pro quer' in errore* would have distinguished this from the case of *Bottomley v. Harrison*, which was trover for a parcel of packcloths, wrappers, and cords; because that was taken as a bundle of several thing not easily to be separated, whereas each diamond was distinct: and it ought to have been brought for so many diamonds. But the court thought there was no difference, and affirmed the judgment. And afterwards on error in Parliament it was likewise affirmed *ex parte*, declining to argue it.

(1) *Vide 1 Com. Dig. Action upon the Case upon Trover*, (G. 1) (G. 3.) 317. 1 *Ld. Raym.* 191.

Dominus Rex *vers.* Malland.

Where there is no appropriation of a statute penalty, it is a debt to the crown, and sueable for in a court of revenue, and not by indictment.

Fitz. 47.

2 Sess. Ca. p.

12. No. 19.

1 Barn. B. R. 108. S. C.

INDICTMENT on the statute of the late King, 12 Geo. 1. c. 35. for burning place bricks and stock bricks together. And on demurrer it was objected by Mr. *Fazakerley*, that in this particular instance, though a penalty of 20 s. per thousand is given, yet there is no appropriation of it, or any method prescribed in which it shall be recovered, though there is as to the rest. And upon looking into the act, it appeared that the offence was omitted out of the clause, which gave the bricklayers

company power to sue for the penalties; and therefore the court held, that the 20s. *per* thousand was in the nature of a debt to the crown, where the unappropriated penalty would go, and was suable for in a court of revenue, and not by indictment. Though *Strange* cited 1 *Mod.* 34. 1 *Vent.* 63. and insisted, that the 20s. ought to be the measure of the fine upon the indictment (1). *Judicium pro def.*

(1) *Castle's case*, Cro. Jac. 643. *ib.* 834. *Rex v. Harris*, 4 Term *Rex v. Wright*, 1 Burr. 543. *Rex Rep.* 205. 2 H. H. P. C. 171. v. *Pensfax*, 1 Barnard. B. R. 127. 2 Hawk. P. C. c. 23. sect. 4. 2 Sess. Ca. 224. *Rex v. Robinson*, p. 301. 2 Burr. 803. In *Rex v. Boyal*,

25

Borough of Christchurch.

UPON a motion for an information in nature of a *quo warranto* against the common freemen; it was held, that they need not be qualified by taking the test, for they do not exercise any office relating to the government of the town, and an information was denied.

Who ought to take the test. Fitzg. 47. S. C.

Dominus Rex *vers.* Woodham.

UPON a motion for an information against the defendant, who was a justice of peace; it was held, that a person in execution in B. R. may be there charged criminally by a justice of peace's warrant. But that no such justice can take a prisoner of this court out of the custody of the court, and send him to the county gaol.

Justices of peace cannot commit one in B. R. to the county gaol

Field *vers.* Curtis.

[829]

IT was held, that no release could make the bankrupt a witness to prove his own act of bankruptcy (1).

Bankrupt cannot prove an act of bankruptcy.

(1) *Ewens v. Gold*, H. 8 Geo. 2. in C. B. H. Black. 279. But the confession or declaration of the bankrupt made prior to the taking out the commission, that he did a particular act from such a motive as either constitutes it an act of bankruptcy in itself, or makes

makes it evidence of one, may, if made without collusion, be given in evidence where such particular act is proved. *Martin v. Eyloc*, ante 809. But this evidence seems not allowable unless it is concomitant with such facts. *Ambrose v. Clendon*, coram *Hardwicke C. J.* *Caf. temp. Hard.* 287.

Coleman vers. Sayer.

At Guildhall coram Raymond C. J.

Within what time a bill must be tendered.
3 Barn. B. R.
303. S. C.

A Bill was drawn payable at six days sight, and presented and accepted 8th of *February*, which made it payable the 14th, and the three days of grace brought it to the 17th, which was a *Saturday*, and the acceptor stopt payment on the *Tuesday* following, before which the bill was not tendered. And upon this evidence it was left to the jury, who were of opinion, that the drawer was discharged at the end of the three days of grace (1).

(1) *Vide East India Company v. Chitty*, post. 1175.

Easter Term

2 Georgii 2 Regis. In B. R.

Sir Robert Raymond, Knt. Lord Chief Justice.

Sir Francis Page, Knt.

James Reynolds, Esq;

Sir Edmund Probyn, Knt.

Sir Philip Yorke, Knt. Attorney General.

Charles Talbot, Esq; Solicitor General.

} *Justices.*

Goodright *vers.* Hart et ux'.

THE defendant as daughter and heir of the late Admiral *Hosier* brought an ejectment, and recovered, and was put into possession: the other side brought an ejectment, and *Hart* and his wife obtained a rule to be made defendants with the tenants in possession, and entred their appearance: but the tenants having been practised upon, refused to appear or make any defence; upon which judgment was signed against the casual ejector, after a trial at bar had been granted; and a writ of possession was taken out, and possession delivered. *Hart* and his wife, the landlords, moved to set it aside, insisting that the only reason for making the landlord a defendant was to secure a trial in all events, and to prevent the tenant from betraying the possession. But the court refused to set aside the judgment, saying that the rule was only, that the landlord should be made a defendant *una cum* the tenants in possession; and therefore if they would not stand the suit, the landlord could not be let in. *Quare tamen*, for this is giving tenants much too great a power, and

No relief against a tenant's refusing to appear and make defence in ejectment.
1 Barn. B. R.
128. 746. 150.
S. C.

and makes them absolute masters of the estate, and to choose their own landlords (1). See 11 Geo. 2. c. 19. § 13.

The court refusing to relieve the landlord, he went down into the country, and prevailed with the tenants, on giving them security to attorn to him; and then the plaintiff in ejectment came and complained to the court, and moved for a new writ of possession. But the court refused to relieve him, there having been a regular execution of the first writ; and said the distinction was, that if immediately after the writ had been executed, the tenants had attorned; there should have been a new writ. But not where the possession had continued as delivered for above a month, as it had in this case.

(1) *Fairdaim ex dem' Fowler v. Shantile*, 3 Burr. 1301. 1303. Where the law of this case is doubted of, independant of the 11 Geo. 2. c. 19. and it is said that that act by which all persons may defend without the tenant in possession, who might before have defended with him, was drawn and introduced into parliament by Sir John Strange, *ib.* 1292.

Dominus Rex vers' Inhabitantes de Norton in Com' Salop'.

Appeal must be to the next sessions after removal, not date of the order.

MR. Abney excepted to an order of sessions for discharging an order of removal, because the justices' order was dated the 21st of June, and the sessions' order was not till Michaelmas sessions following, so that *Midsummer* sessions intervened.

To this it was answered, that by the express words of the statute the appeal is to be the next sessions after the parties find themselves aggrieved, which is not till the removal: and for ought appears, *Michaelmas* sessions might be the next sessions after the grievance. And so it was held in the case of the parishes of (a) *Milbrook* and *St. John's* in *Southampton*, *Mich.* 1 Geo. 1. in *B. R.* To which the court agreed, and the sessions' order was affirmed.

(a) *Cases of Sett. and Rem.* pl. 83. p. 66.

Between the Parishes of *St. Michael Cossaff* in *Norwich* and *St. Matthew's* in *Ipswich*.

If a son grown up does not remove with his father, he gains no settlement in the last place his father lived in.

UPON an order of sessions the case was specially stated, on a removal of *Edmund Williams* and *Amy* his wife, and *Edmund*, *Solomon* and *Amy*, their children, from *St. Michael's* to father lived in. 1 Barn. B. R. 103. 157. Andr. 380. 2 Sess. Ca. p. 154. No. 159. 44. pl. 71. S. C. more full.

St. Matthew's: that *Edmund Williams* the elder, the father of *Edmund Williams* removed, was settled at *Shipton Mallet*, and afterwards removed to *Bruton*, where he continued twenty years, and had *Edmund* the son born there, whom he bred up in his own trade till nineteen years old, when he left his father and came to *Norwich*, and married, and had the three children. That since the birth of the children old *Edmund* the grandfather gained a settlement in *Ipswich*, to which the two justices removed the family. But the sessions being of opinion, their settlement was not at *Ipswich*, discharged the order,

Et per cur⁹, The order of sessions is right. For there is no colour to say the son and his family were settled at *Ipswich*, where they never were; and this is exactly the same case as that of *Eastwoodhay* and *Westwoodhay*. *Ante* 438. (1)

[832]

But then an exception was taken to the order of sessions, that it is said to be made at a sessions held by adjournment such a day; and does not shew that the sessions commenced within the time prescribed by the act: it should have been *ad sessionem inchoatam* such a day, and held by adjournment after. And for this fault the order of sessions was quashed. *Strange pro Ipswich* (2),

Where an order is made at an adjourned sessions, it must appear the sessions began in time.

(1) *Bugden v. Amptbill, Burr. S. C. 270. S. P.* See also upon this subject *Rex v. Walpole St. Peter, Burr. S. C. 638.* *Rex v. Offchurch, 3 Term Rep. 114.* *Rex v. Winton cum Twambrooke, ib. 355.*

Rex v. Collingbourn Ducis, 4 Term Rep. 199.

(2) *Rex v. Harrowby, Burr. S. C. 102.* *Rex v. Hoptonstall, ib. 88. S. P.*

The Case of Schriven and Turner.

A *Mandamus* was granted to the court of aldermen in *London*, to restore them to the office of yeoman of the wood-wharf, on an affidavit of its being an ancient office and a freehold.

Mandamus for yeoman of the wood-wharf.
1 Term Rep. 404.
3 Term Rep. 652.

Bowles vers. Bridges and Markwick.

COVENANT on a deed dated 31 August 1720, whereby in consideration of 420*l.* paid by the plaintiff to the defendants, they covenanted, that they or one of them, on three

What is a sufficient tender (1).

(1) See *Thornton v. Moulton, ante* 533. *Blackwell v. Nayb, ante* 335.

days

days notice in writing, to be left at the house of the defendant *Bridges* any time in a year, would accept, or cause to be accepted, 2000 *l.* *South-sea* stock, and all additions, and dividends, and pay for the same on transfer thereof 12,000 *l.* with a proviso, that if the plaintiff should subscribe in the 20 *per cent.* subscription proposed to be taken in, and pay what is requisite to the expiration of the contract; the defendants should pay the same over and above the 12,000 *l.* but if the plaintiff did not tender the stock and dividends, then the agreement was to be void, and the defendants were to retain the 420 *l.* Then the plaintiff avers, that the company did not take in any stock subscription; and although on 16 *August* 1721, he gave notice in writing at the house of *Bridges*, that on the 19th of *August* he would transfer the stock and dividends, *ac licet* he was ready at the *South-sea-house* where the books were kept, and offered to transfer according to notice; yet the defendants, or either of them, did not accept the stock, or pay the 12,000 *l.* but refused, and still do refuse so to do. *Dem' inde, et pro causa*, that it does not appear what dividends or profits were made and tendered.

[833]

And *Reeve pro defendente* argued, that the declaration was ill on that account, for he ought to have shewn what they were, that the court might see he made a tender of all. 2. The usual hours of transferring stock are not shewn, so it does not appear he was there the last instant of time, as he ought to be according to the case of *Lancashire v. Killingworth*, *Salk.* 623.

Bootle contra. The dividends and profits are known and certain, and the defendants had the same opportunity to know what they were as the plaintiff had. 2 *Cro.* 171. As to the second exception, he agreed that if it rested only on a tender, the declaration would be ill; but here he said there was an actual refusal, and that is enough, be it at any time of the day: and great difference there was between a tender and refusal, and tender and non-acceptance, 1 *Inst.* 206. b. 5 *Co.* 114. (2) *Sed per curiam*, The refusal is not laid as an act done by the defendants, but only as a conclusion the plaintiff draws from the premises: it is not said to be *adtunc et ibidem*, so that for anything appears it might be at another time and place: and the plaintiff must precisely intitle himself to the action. And as

(2) *Vide Jones v. Barkley*, pleat tender, he must shew *Doug.* 694. The cases cited in *Vide Austyn v. Jervoise*, *Hob.* 69. *Blackwell v. Nash*, ante 535. But *Anon.* 2 *Roll. Rep.* 238. *Lancashire v. Killingworth*, 1 *Ld. Rep.* 687.

the first objection, the declaration is certainly informal, and it is shewn for cause of demurrer. The plaintiff discontinued on payment of costs.

Jones *vers.* Mason.

At Nisi Prius in Middlesex, coram Raymond, Chief Justice.

JOH N Ward of Hackney (who had been convicted for forgery) was a subscribing witness to a bond; and on producing the record of his conviction, the plaintiff was allowed to prove his hand as if dead (1).

If the witness to a deed becomes infamous, he is to be considered as dead.

1 Barn. B. R. 104. 116.

(1) *Godfrey v. Norris*, ante 34. *Swire v. Bell*, 5 Term Rep. 371.

Evans *vers.* Thomas.

THE roll of the judgment was carried in, in *Trinity* 1720, and docketted; but before filed was mislaid and lost. And *Strange* moved for leave to file a new roll, the defendant being dead, and the executrix consenting: and cited *King v. Bolton*, ante 117. and *Needham v. Grano (a)*. And after a rule to shew cause, it was ordered accordingly, for there being a docket, it could be no deceit upon purchasers (1).

New roll ordered to be filed the former being lost.

1 Barn. B. R. 160. 164. S. C. (a) Ante 141.

(1) *Post*. 1007. 1264. 2 *Kely*. 106.

Dominus Rex vers. Wynd et al^o.

[834]

INDICTMENT for a riot, and riotously taking away two water-engines; after verdict *pro rege* it was moved in arrest of judgment, that there was no *vi et armis*. 2 *Keb.* 133. 1 *Vent.* 265. *Sed per curiam*, The riotose ceperunt, fragerunt et prostraverunt, implies a force, and the indictment is well enough. *Vide* 37 *Hen.* 8. c. 8. *Cro. Car.* 345. 472. 2 *Lev.* 221. *Sti.* 12. *Judicium pro Rege*.

Vi et armis is implied in a riot.

2 *Seff. Ca.* p. 13. No. 20.

Barnard. B. R. 158. 162.

Fitz. 63. S. C.

all more full.

Vide 1 *Hawk.*

P. C. ch. 64.

f. 44. p. 287.

2 *Hawk.* P. C.

c. 25. l. 91. 344.

Goodtitle vers. Walton.

AFTER verdict *pro quer* in ejectment, the judgment was arrested, because it was for a messuage, a garden and a tenement, and entire damages; whereas an ejectment *de uno tenemento* will not lie (1). *Strange pro quer*.

Ejectment lies not for a tenement.

1 Barn. B. R. 155. 164. S. C.

(1) *Wood v. Payne*, *Cro. Eliz.* Pop. 197. *Rochester v. Rikhouse*, ib. 36. 3 *Leon.* 228. S. C. *Anon.* 203. *Cro. Jac.* 124. 455. *Cro. Car.*

Car. 471. 553. Yelv. 118. Noy. Sed vide *Cottingham v. King*, 1 Burr. 621. *Connor v. West*, 5 Miers, 3 Mod. 238. *Birbury v. Burr*. 2673. *Massey v. Rice*, Comp. Teemans, 1 Sid. 295. 2 Keb. 350. in which the court inclined 82. *Copleston v. Piper*, 1 Ld. against, and *Doe ex dem. Stewart* Raym. 191. *Makepeace v. Hopwood*, Barnes 173. *Goodright v. Flapd*, 3 Wils. 28. S. P. which they over-ruled the objection.

Dominus Rex *vers.* Woolston.

To write against Christianity in general is punishable in the temporal courts at common law (1).
Fitzg. 64. S. C. more full.
Ante 789.

HE was convicted on four informations for his blasphemous discourses on the miracles of our Saviour. And attempting to move in arrest of judgment, the court declared they would not suffer it to be debated, whether to write against Christianity in general was not an offence punishable in the temporal courts at common law: it having been settled so to be in *Taylor's case* in 1 Vent. 293. 3 Keb. 607. 621. and in the case of *The King v. Hall*, ante 416. They desired it might be taken notice of, that they laid their stress upon the word *general*, and did not intend to include disputes between learned men upon particular controverted points. The next term he was brought up, and fined 25*l.* for each of his four discourses, to suffer a year's imprisonment, and to enter into a recognizance for his good behaviour during his life, himself in 3000*l.* and 2000*l.* by others.

(1) *Rex v. Annet*, H. 2 Geo. 3. 3 Burn's Eccl. Law 203. S. P.

Rejindoz *vers.* Randolph.

Of costs on quashing writs of error.

THE writ of error being returnable before judgment given, was quashed, and the plaintiff in error paid costs; it appearing to be his fault in using the writ after he knew it was spun out by his own motion in arrest of judgment. The court said they would have made the defendant in error pay the costs, if it had appeared that he entered continuances on purpose to defeat the writ of error (1).

(1) Vide *Gould v. Coulthurst*, ante 139. *Vice v. Burton*, post. 891. *Wilson v. Ingoldsby*, 2 Ld. Raym. 1179. *Canning v. Wright*, ib. 1531. But in almost all cases the writ is sued out before judgment signed, because otherwise execution would issue instantly." Per Buller J. *Jaques v. Nixon*, 1 Term Rep. 230.

Trinity Term

3 Georgii 2 Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*

Sir Francis Page, *Knt.*

James Reynolds, *Esq;*

Sir Edmund Probyn, *Knt.*

} *Justices.*

Sir Philip Yorke, *Knt. Attorney General.*

Charles Talbot, *Esq; Solicitor General.*

Dominus Rex vers. Lewis.

STRANGE moved for a *mandamus* to three justices of peace in *Brecon*, to take security on articles of the peace exhibited against the defendant in *B. R.* and produced an affidavit his being seventy years of age, and unable to travel; and cited *Amour's case*, *Mich. 6 Ann.* and it was granted in this case.

Mandamus to take security on articles.
2 Sess. Ca. p. 69.
No. 72.
1 Barn. B. R. 166.
Fitz. 35. S. C.

N. B. Trin' sequen', on affidavit of having kept the peace, and being unable to come up, the recognizance was discharged.

Worral vers. Bent et al'.

AFTER verdict in ejectment on two demises, where the second was laid to be of other lands, it was objected on appeal, that the judgment is only to recover *terminum suum* in the singular number, so uncertain which. *Sed per curiam*, It is *de tenementis prad'*, which *reddendo singula singulis* is well enough, for there is but one term in each part of the premises.

Where there are two demises of different lands, judgment to recover his term, in the singular number, is sufficient.
Fitzg. 83. S. C.

N

misses (1). Judgment affirmed. *Strange pro defendente in errore.*

(1) *Fisher v. Hughes*, *post.* 908. *Morris v. Barry*, *post.* 1180.

Rochtschilt verf. Leibman.

The statute of Limitations will not run against action on bill of exchange where plaintiff is beyond sea (1).

THE plaintiff brought an action upon a bill of exchange, to which the defendant pleaded the statute of Limitations, and the plaintiff replied himself beyond sea, to which the defendant demurred. And *Reeve* objected, that no actions on the case are within the proviso, but actions on the case for words: and cited *Cro. Car.* 245. *Show.* 98.

Parker contra, Where the words of a statute are general, they are to be understood in that sense. 10 *Co.* 101. It is impossible to think so trifling an action as for words should be saved, and not those which are founded on a contract; besides, it has been determined that the proviso extends to this case. 2 *Saund.* 120. 2 *Mod.* 71. *Lutw.* 244. *Et per curiam*, Judgment for the plaintiff.

(1) *Vide Stritborst v. Greene*, it was held that the action must be brought with six years after the cause of action arofe. *Perry v. Jackson*, 4 *Term Rep.* 516. But in an action upon a bill of exchange by the payees, where one plaintiff had been abroad, and the other in England,

Dominus Rex verf. Boyles.

Quo warranto lies for setting up a new office. *L. Raym.* 1559. *Pitz.* 82. *S. C.*

INFORMATION *in natura de quo warranto* against the defendant to shew by what authority he claimed to be bailiff of the ville of *Southwold* in the county of *Suffolk*. And on demurrer it was objected by *Hussey*, that it doth not appear *Southwold* is any corporation, either by charter or prescription, so as to make this a usurpation upon the crown; it may be only a private office, as bailiff of a manor, for a ville is not a borough, and *ballivus* is but a servant. 2 *Cro.* 177. *Sed per curiam*, it is said to be an ancient town, and that this is a publick office, an office of great trust and pre-eminence within the town, *gens regimen et gubernationem villæ prædictæ, et administrationem publicæ justitiæ infra eandem villam*, all which is confessed by the demurrer. And certainly the setting up such an office is a usurpation. Suppose a man should set up to preside at *Ipswich*

as a publick officer, and have *insignia* carried before him, is he not to be punished for this, and have you any other way to come at him but by such an information? It is never laid otherwise than that it is a publick office relating to the administration of publick justice (1). *Judicium pro rege.*

(1) *Rex v. Nicholson*, ante 299. *Rex v. William Wallis*, 5 Term and vide *Rex v. Sir Thomas Reynale*, post. 1161. and the note, and *Rep.* 375.

Hetherington un', &c. *vers.* Lowth.

[837]

THE defendant pleaded the privilege of *C. B.* and the plaintiff moved to set it aside, he suing as an attorney of *B. R.* upon the foot of privilege taking away privilege (1). But the court said, that was a point of law which they would not determine on a motion, but put the plaintiff to demur to it. *Strange pro quer'.*

Plea, refused to be set aside.
1 *Barr. B. R.*
182. 228. *S. C.*

N. B. This was moved again next term by *Reeve*, and we produced the declaration, by which it appeared the plaintiff sued by original, which was held a waiver of his privilege.

(1) *Lauder v. Cockayne*, *Barnes* 1325. *Guy v. Reynell*, 2 *Brownl.* 44. Held in *C. B.* that it shall. 266. In *C. B. S. P. Lunn v. Danfer v. Berryman*, 2 *Black. Afcough, Barnes* 43. *contra.*

Rutter *vers.* Redstone.

AFTER error in the Exchequer Chamber the transcript was brought back and amended in *B. R.* by the original record. And it was held necessary to make the amendment here (1), as this differs from the case of a writ of error from *C. B.* because the Common Pleas sends up the very record, and the King's Bench sends only a transcript.

B. R. does not send the record to Exchequer Chamber.

(1) See *Tully v. Sparkes*, post. 869. acc.

Higgs *vers.* Evans.

Will not quash error though appears 29 years after judgment.

MR. *Ketelbey* moved to quash the writ of error, because it appeared there was twenty-nine years between the judgment and the bringing the writ, whereas the party is restrained to twenty years. *Per curiam*, So he is, but this will be to deprive him of the benefit of replying the exceptions in the statute. *Nil cap. per motionem. Strange pro quer' in errore.*

Dominus Rex vers. Archiep' Ardmagh et Nathaniel' Whaley, clericum.

Intr. Trin. 13 Geo. 1. rot. 143.

In *quare impedit* by the King for the next turn of a living void by promotion, defendant pleads that the crown presented *D.* who is since dead, and that he himself is now presented, *G. parson imparsonne*, with a traverse that the church is still vacant by the promotion; this is a confession and avoidance, and the traverse being therefore bad, it may be passed over, and issue taken upon the avoidance. Where the declaration having set forth that *B.* the late Archbishop was seised as of fee in right of his Archbishoprick of the advowson of *A.* &c. and the Archbishop by his plea admits this seisin and the vacancy by promotion as alleged, but pleads further that the crown by patent granted to *D.* the deanery of *A.* with all its rights, members, &c. by virtue whereof he was possessed of the church of *A.* as a member of the deanery, &c. this is ill, as it neither shews a presentation, or that the church is a member of the deanery.

ERROR of a judgment in *B. R. in Hibernia* on a *quare impedit* brought by the crown against the Archbishop of *Ardmagh* and *Nathaniel Whaley*, clerk.

The declaration sets forth, that *Michael Boyle*, late Archbishop of *Ardmagh* was seised as of fee, in right of his Archbishoprick, of the advowson of the church of *Ardmagh*, and being so seised collated *Bartholomew Vigors*, who was admitted, and afterwards made bishop of *Leghlin* and *Fernes* by King *William* and Queen *Mary*, whereby it belonged to the crown to present upon such promotion: that during the vacancy Queen *Mary*, and then King *William*, and then Queen *Anne*, died, and so it belonged to King *George* the First to present, but the Archbishop and *Whaley* obstruct.

The Archbishop prays *oyer* of the writ, and then pleads, that true it is that *Michael Boyle* was seised in right of his Archbishoprick, and that the church became vacant by the promotion of *Vigors*, unde it belonged to the crown to present for that turn: but then he says, that King *William* and Queen *Mary* by letters patent 23 February, 3d of their reign, granted to *Peter Drad-* court the deanery of *Ardmagh*, with all its rights, members and appurtenances, by virtue whereof he was possessed of the church of *Ardmagh* as a member of the deanery, and enjoyed the same to his death: that *Michael Boyle* died, and *Narcissus Marsh* succeeded him, and became seised of the advowson, and upon his death it came to *Thomas Lindsey*, in whose time *Vigors* the pro-

posed that the crown by patent granted to *D.* the deanery of *A.* with all its rights, members, &c. by virtue whereof he was possessed of the church of *A.* as a member of the deanery, &c. this is ill, as it neither shews a presentation, or that the church is a member of the deanery.

motee died: that *Drelincourt* is since dead; by which the right of presenting was in *Lindesay*, who 5 May 1722, presented the other defendant *Whaley*, who is now incumbent.

The defendant *Whaley* likewise prays *oyer* of the writ; and then pleads, that he is parson imparsoned of the collation of the late Archbishop: that the church did become vacant by the promotion of *Vigors*, and that the crown presented *Drelincourt*, who was admitted, instituted, and inducted: then he deduces the title from *Boyle* to *Lindesay*, as in the Archbishop's plea, with the death of *Vigors*; and says, that *Drelincourt* died 8 March 1721, and *Lindesay* 5 May following presented him, upon which he was put into possession of the living before bringing the King's writ; and concludes with a traverse, that the church is still vacant by the promotion of *Vigors*, as is alleged in the declaration.

The Attorney General as to the Archbishop's plea demurs; and shews for cause, that it is not averred in the plea, that the church of *Ardmagh* was a member of the deanery, or enjoyed as such by *Vigors*, or presented to as such by King *William* and Queen *Mary*. And the Archbishop joins in demurrer.

As to *Whaley's* plea, the Attorney replies, that King *William* and Queen *Mary* did not present *Drelincourt* to the church of *Ardmagh*, and concludes to the country.

To this replication *Whaley* demurs generally, and after a binder in demurrer, and several continuances, there is judgment in *B. R.* in *Hibernia*, that the Archbishop's plea is a good bar, and that the Attorney's replication to *Whaley's* plea is insufficient; *ideo defendentes eant inde sine die, &c.*

[839]

Of this judgment a writ of error is brought, the general errors assigned, and *in nullo est erratum* is pleaded.

Strange pro rege argued, that the court below has erred in both instances. 1. In giving judgment, that the Archbishop's plea is a good bar; and 2. In adjudging that the Attorney General's replication to *Whaley's* plea is insufficient.

As to the first point, I need only to enumerate the causes which are specially assigned in the demurrer: and it is inconsistent to say the living belonged to the Archbishoprick, and at the same time insist that it passed by the King's grant of the deanery. But then it will be rightly urged, that the King can give no writ to the bishop, unless he overthrows both parts of

the judgment : and therefore I shall endeavour to shew, that the judgment in favour of *Whaley's* plea, and against the Attorney's replication, is as erroneous as the other.

And upon this the principal question will be, whether the traverse at the end of *Whaley's* plea be so material, that the Attorney General could not pass it over, and take issue on the presentation of *Drelincourt*, as alledged in the plea. And that will depend on the consideration whether the plea without the traverse had sufficiently confessed and avoided the title of the crown, as set forth in the declaration. For if it had, then the traverse will be improper and immaterial : if it had not, then a traverse might be necessary, and if it was well taken, the Attorney General could not pass it over.

But I take it the plea of Mr. *Whaley* is a full confession and avoidance. The title set up by the crown is a prerogative title (not now to be disputed) to present upon the promotion of *Bartholomew Vigors* to the bishoprick of *Leghlin* and *Ferns*. The substance of *Whaley's* plea is, first a confession that there is such a prerogative, and that *Vigors* was so promoted ; but then to avoid the King's recovering in this suit, he says, that the crown has had its turn already by the presentation of *Drelincourt*. By this plea all matters in dispute, except the presentation of *Drelincourt*, are agreed. The vacancy by promotion is agreed ; the prerogative is agreed ; and the only thing remaining in controversy is, whether the crown has exercised the prerogative in this instance. To that the Attorney General very properly answers, that the crown has not had its turn, for that they never presented *Drelincourt* : and if the cause had gone to trial upon that issue, it would have been tried upon the most material point, nay the only point remaining in dispute. As therefore this plea without the traverse is a full confession and avoidance, it would be mispending time to cite cases to prove that where I confess and avoid, I ought not to traverse : the confession and avoidance is a full defence of itself, and to add a traverse is but to make the plea repugnant.

There remains only one thing to be added upon this head, and that is, that as the traverse was immaterial, it was in the election of the Attorney General, either to demur upon that account, or to pass it over, and offer a new traverse upon the matter of *Drelincourt's* being presented by the crown. For this there was a case in *B. R. Mich. 5 Geo. King qui tam v. Bolton*. There the plaintiff declared in prohibition, that he was duly elected a common council man of *London*, and the defendant had petitioned against him in the court of common council, which had no jurisdiction

[840]

Yel. 151, 221.
Lat. 156.
6 Co. 24.

Ante 117.
and the note.

jurisdiction to examine into the validity of the election, the cognizance whereof belonged to the court of mayor and aldermen: the defendant in his plea states his own election, and that he petitioned against the plaintiff in the common council *prout ei bene licuit*, and then concludes with a traverse, that the jurisdiction is in the court of mayor and aldermen: the plaintiff in reply passes over this traverse, and offers another issue on the point whether the common council had the jurisdiction: and on demurrer it was resolved by the whole court, that the true point of the prohibition being, whether the court to be prohibited had jurisdiction or not; it was improper for the defendant to go off from that, and offer an issue as to the jurisdiction of the mayor and aldermen; and that though the plaintiff might safely have demurred, for the immateriality of the traverse, yet he was not bound to do it, but was at liberty to take a new traverse, in order to bring the merits of the case in issue: pursuant to which resolution judgment was given for the plaintiff in prohibition, and upon error in Parliament that judgment was affirmed.

But whatever should be the opinion of the court upon the question, whether a traverse could be added, yet I apprehend the traverse here taken by *Whaley* is an ill traverse, and we being upon a demurrer must go back to the first fault, which is in the defendant's plea. The plea has stated the fact, and whether that fact amounts to a plenarty against the crown is a consequence of law arising upon that fact. The traverse here is, that the church is not now vacant, which being a consequence of law, ought not to be traversed (1). 11 Co. 10. b. *Plow.* 231. a. 496. a. *Paf.* 1 Geo. *Rex v. Blagdon*. In an information in nature of a *quo warranto*, the defendant made title under the constitution of *Homon*, and then traversed the usurpation: the Attorney General, without taking any notice of the title, joined issue upon the traverse; and it was held to be ill, because the user being admitted by the defendant's making title, the usurpation was a matter of law not to be sent to a jury.

[841]

But then it was argued below (and will be insisted on here) that if the Attorney might take a new traverse, yet his present traverse is ill, because it ties up the defendant to prove a presentation, when institution and induction is sufficient.

To this I answer: that the law is not so, there must be a presentation to make the church full against any common person who

(1) *Vide the Grocers' Company bury and Backhouse*, 2 Black. 776. *Against the Archbishop of Canter-* 3 Wils. 214, to 324. S. C.

has the right, and much more against the crown. So is 6 Co. 50. a. 1 Leon. 226. Here the only act pleaded to be done by the crown is the presentation; the institution and induction being the acts of others in consequence of that act; the traverse therefore was proper, in denying the only act alledged to be done by the crown, and the only act that could create a plenary against it.

Where the crown has a title to present on promoting the incumbent to a bishoprick, it is not necessary to be done during the life of the promotee. But the crown loses its turn if there has been presentation of another by some one else, and such presentee dies.

Another objection was, that it appears upon the record, that *Vigors* the promotee died before the *quare impedit* brought, and therefore (say they) this is not a case within the reason on which the prerogative is founded, (*viz.*) that it is but changing one life for another. If this objection had any authority in law to support it, it might be reasonable to go into the consideration of it: but as the life of the promotee was never thought necessary to be averred, it is plain the law was taken to be otherwise. The patron, the bishop, and the metropolitan may lapse, *sed nullum tempus occurrit regi*; and the case in *Ow. 2.* which is an exception to the rule, does not come up to this case; for there it is put of a lessee *pur auter vie* being attainted of treason, where no doubt the King must present during the life of *cestuy que vie*, because his title continues no longer.

For these reasons I apprehend the replication is good, and the judgment in both instances, on the Archbishop's plea, and the Attorney's replication to *Whaley's* plea, is erroneous, and ought to be reversed, and a writ awarded to admit his Majesty's clerk.

[842]

Darnall Serjeant contra. I shall insist that upon the whole record there does not appear any title in the crown to present at the time of bringing the *quare impedit*. Here are thirty years after the promotion, which are not accounted for; and though I am not to dispute whether there is such a prerogative, yet surely the crown is bound to exercise it in a reasonable time. The reason given for the prerogative is, that it is but changing one life for another, and the patron has an equal chance: but if the crown can stay till the person promoted is dead, then a new life is put upon the patron, and so far he is prejudiced by the promotion. In many cases *tempus occurrit regi*. *Regist. 31. Cro. El. 44. Ow. 2. Cro. Jac. 216. Cro. El. 119. 1 Bulst. 26.*

Against a rightful patron institution and induction is not enough, but here the King is not rightful patron, he has not the permanent, only a transitory right, as in the case of lapse.

As to the traverse in the plea: the vacancy is the foundation of the King's bringing the *quare impedit*: and therefore it is traversing

reversing the most material part of the declaration. *Cro. Car.* 61. And if so, then the Attorney General could not pass it over, and take a new traverse. *Hob.* 318. *Lutw.* 1560. *Hutt.* 96.

Per curiam, It is impossible to maintain the primate's plea, which neither shews a presentation, nor that the church was a member of the deanery: therefore all the facts alleged in that plea are to be laid out of the case, not being admitted by the demurrer, because ill pleaded. 5 Com. Dig. Pleader. (Q. 6.) 433.

As to *Whaley's* plea; it is a full confession and avoidance without the traverse; which for that reason is immaterial, and might as such be passed over.

As to the length of time: there is no doubt but *tempus occurrit regi*, if there had been a presentation; for the King's is the next turn, and if he suffers another to present, and the incumbent dies; the turn of the crown will be as much gone, as it would be in case of any common grantee of the next avoidance: but upon this record we must take it, that the King comes before any presentation: and no case is cited to prove the crown is limited in point of time. If it must be done in the life of the promotee, a declaration will not be good without averring his life, which was never done. In the case of simony the crown was not barred by ever so many presentations before the act of Parliament; and if the grantee of the next avoidance should come at one hundred years distance after the death of the incumbent, he must have his turn, if there has been no presentation all the while. If a common person had presented *Drelincourt*, he being dead, the crown would have lost its turn; but without a presentation it can be no plea against the person who has the right, which is the crown in this instance, though the advowson is in another, which cannot alter the case.

1 W. & M. 2. 1. c. 16.

[843]

We are all therefore of opinion, that the court below has erred in both instances, and therefore the judgment must be reversed *in toto*, and a writ awarded here (as it should have been below) to admit his Majesty's clerk.

Upon error in Parliament, the House of Lords were of opinion, that this being a civil suit of the crown, the writ of error was abated by the death of the King, and therefore reversed the judgment of reversal in *B. R.* And a new writ of error being now brought, and the same record returned, the court was not inclinable to suffer it to be spoke to, looking upon themselves only as a channel to convey the cause again to the House of Lords. But *Bootle* pressing to be heard as to a new point, objected

Where the King brings a writ of error in *quare impedit*, it abates by his death. *1 Com. Dig. Abatement. (H.) 38. 77.*

Subscribing the articles need not be alleged in *quare injecti*, either in the declaration or plea.

jected that the traverse at the end of the incumbent's plea was material, because what went before could not in all events be a turn, since the presentee, for any thing that appears, might not subscribe the articles: and cited 5 *Co. Windsor's case*. *Winch.* 13. 2 *Cro.* 656. *Yelv.* 115. *Sed per curiam*, Then you are not parson imparsoner to be let in to controvert this, for you have not alleged a subscription of the articles; and it is as necessary in your plea as in the King's count, though the truth is it was never alleged in either.

As to the other points, the court stood to their former opinions, and reversed the judgment given in *Ireland*, and gave judgment for the King.

N. B. On a second writ of error in Parliament, all the Judges attended, and were unanimously of the same opinion with the Judges of *B. R.* notwithstanding which, the judgment of *B. R.* in *England* was reversed, and the judgment in *Ireland* set up again.

Dominus Rex vers. Hayes.

In an indictment a variance in the addition of the obligor was amended after special verdict, the record of *nisi prius* having been made up by defendant's clerk in court. If a special verdict upon an indictment for three offences finds facts which

prove the defendant guilty of two, and refer it to the opinion of the court whether he is guilty of the fact charged in the indictment, they will adjudge him guilty of these two, and not guilty of the rest. *L. Raym.* 1518. *S. C.* *Fuller* and with two other points. 1 *Barn. B. R.* 31, 32, 48, 142, 167. *S. C.*

[*844]
1 *Com. Dig.*
Amendment.
(*A.*) 444.

THE defendant was indicted for forgery of a bond: and upon the trial there appeared a variance in the addition of the obligor, upon which a special verdict was found, the Chief Justice doubting whether it was a variance or not, it being *per roch'* for *paroch'*: and after the verdict was drawn up, the prosecutor moved for leave to amend the *nisi prius* roll by the record of the indictment, which was right; and alleged, that the record of *nisi prius* had been made up by the clerk in court of the *defendant, who might be suspected to have made it wrong on purpose.

The court seemed to think this was amendable at common law, there being something to amend by: but they said there was no occasion to give any opinion upon that, since they were warranted to amend it, as being a fault committed by the defendant, who ought not to take advantage of it.

On arguing a special verdict in a criminal case defendant need not be in court.
Ante 767.

The variance being thus removed out of the case, the cause was put into the paper to be argued upon the special verdict; and the counsel for the defendant attempting to speak, it was insisted that the defendant ought to be in court, as upon motions in ar-

rest of judgment. To which it was answered, that a motion in arrest of judgment is after a verdict; whereas till this special verdict is argued and determined, the defendant is not to be looked upon as guilty: and the court thought this a reasonable distinction, and suffered the defendant's counsel to go on.

And then it was argued, That it was an imperfect verdict. *Strange pro def.* The indictment is for three distinct facts: 1. For forging a bond; 2. for publishing *such* bond so by him forged; and, 3. for publishing *a* bond, knowing it to be forged. To these three offences the defendant pleads Not guilty, and the jury were charged to inquire of the whole, and in their verdict they find, that he forged a bond in the words and figures following, and that he published the same; but they say nothing as to the third offence, but conclude, that if upon this evidence the court is of opinion he is guilty of the facts charged in the indictment, then they find him guilty; and if the court think him not guilty, they find accordingly.

Upon this state of the case it was insisted on, that the jury ought to find all the issues with which they are charged; and since the evidence extended to facts only, they should have found him Not guilty as to the third. 3 *Lev.* 55. Trespas for taking a gown and manteau: it is found specially, that the defendant took the gown for a tax, and said nothing as to the manteau, and held a discontinuance. *Cro. Eliz.* 133. 2 *Roll. Abr.* 722. *pl.* 19. and 2 *Sid.* 86. it is said, that in all special verdicts the Judges will not adjudge of any matter of fact but that which the jury declare to be true of their own finding. *Trials per Pais* 236. Here the court are specially tied down, to say whether upon the evidence laid down before them the defendant is guilty of *all* the facts; and that they cannot say, because there is no evidence as to one. *Co. Litt.* 227. *a.* A verdict that finds part of the issue, and nothing as to the rest, is insufficient for the whole: as in an information of intrusion into a messuage and one hundred acres of land, the jury find as to the land, and nothing as to the house, it is void for the whole. *Godb.* 57. 2 *Leon.* 194. *Hard.* 166.

[845]

The court held, that as the verdict stood, they could not give judgment that the defendant was guilty of all the offences, the evidence only warranting them to adjudge him guilty of the two first, the last not being confined to the same bond; or if it was, yet every publication is a distinct offence. But then they thought themselves not tied up by the special conclusion, but that the whole evidence being laid before them, they were to do what the jury ought to have done. And therefore they adjudged, that upon

The duty of the court on special verdict.

upon the matter referred to them by the jury, it appeared to the court that the defendant was Guilty of the forgery and first publication, and Not guilty of the rest.

May move in arrest any time before judgment signed.

A *certiorari* to remove an indictment need not describe whether the offence be laid *contra form. statuti*.

Judgment not having been signed, the court was of opinion, the defendant might move any thing in arrest of judgment. And it having been taken notice of by the counsel for the King, that the forgery was laid to be *contra formam statuti*, and the judgment prayed upon the statute; it was then objected by the counsel for the defendant, that all the proceedings against him were void, for that the *certiorari* and the *venire* and *distringas* were as if it had been an indictment at common law; and many precedents were cited, where the process always run, *de quibusdam transgressionibus et contemptibus contra formam statuti*. And indeed that distinction had been kept up in all the forms of the crown-office. But the court thought it not necessary, for a *certiorari* to remove all indictments will remove one for forgery on the statute; and the jury are summoned to try whether he is guilty of the offence whereof he is indicted, which is a sufficient warning to appear in the cause; and therefore they pronounced the judgment upon the statute, and he stood in the pillory at *Charing-Cross*, and had one ear cut off, and then was carried to the *King's Bench* to suffer a year's imprisonment; during which he moved for the liberty of the rules, which was denied, he being in execution (1).

(1) *Vide* case of *Landen Jones*, ante 817.

Michaelmas Term

3 Georgii 2. Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*

Sir Francis Page, *Knt.*

James Reynolds, *Esq.*

Sir Edmund Probyn, *Knt.*

} *Justices.*

Sir Philip Yorke, *Knt. Attorney General.*

Charles Talbot, *Esq; Solicitor General.*

Hatton *vers.* Walker.

THE defendant concluded his plea with *unde petit judicium sed* (instead of *fi*) the plaintiff *actionem manutenere debeat*. And on demurrer the plaintiff shewed it for cause, and the defendant joined in demurrer. And coming afterwards to amend by the draft under counsel's hand (1); it was objected, that the intent of requiring mistakes in point of form to be shewn for cause of demurrer, was to give the party an opportunity to amend before he proceeded any further: but if after notice of his fault he will be so hardy as to join in demurrer, he is not intitled to the favour of amending. And the court now strongly inclined against giving leave to amend; till *Parker* at another day cited *Cro. Car.* 144. and *Hil.* 8 *Ann.* in *B. R.* *Brownjohn v. Dingley*, where the *avowry* was amended by the draft under counsel's hand, after there had been a demurrer, and the cause made a *concilium*: upon the authority whereof they gave leave to amend in this case.

Amendment after a special demurrer.

1 Barn. B. R.

213, 220, S. C.

Post. 954.

(1) *Anon. Cases B. R. Temp. Hardw. 205.*

Stephens *vers.* Haughton.

Difference between trespass and replevin as to avowries.
1 Barn. B. R.
128, 214.
Fitzg. 108. S. C.

IN replevin the defendant avowed as bailiff of the dean and chapter of *Westminster* for an amercement at the court-leet, for making bread wanting weight, contrary to 8 *Ann. c.* 18. which gives the leet jurisdiction. And on demurrer it was held to be an ill avowry; because it was not averred, that the defendant was guilty. And a difference was taken between replevin and trespass; that in trespass the conviction is sufficient to justify the officer, who is only to excuse himself, whereas in replevin the defendant is an actor, and makes title for a return of the goods. *Carth.* 73. *Mo.* 75. *Cro. El.* 885. *Skinner* 587.

Amercements must be by the court, and not by the jury.
5. Com. Dig. Pleader.
(3 K. 27.)
768.
3 Com. Dig. Leet
(O. 2.) 762.

Another objection was taken and allowed, that it appeared the amercement was by the jury, and not by the court, as it ought to be; and that there was no affeerement. 3 *Lev.* 19, 206. 8 *Co.* 38.

For these reasons the avowry was held ill, and the plaintiff had judgment.

Enys *vers.* Mohun.

Repleader awarded after an immaterial issue.
1 Barn. B. R.
182, 220. S. C.

IN covenant the plaintiff declares on a lease made to *Cosier*, which he lays to have come by assignment to the defendant. The defendant pleads, that *Cosier* did not assign to him: and after issue joined, a repleader was awarded, it being an issue joined on what is not alleged in the declaration; for that does not say *Cosier* assigned to the defendant, but that it came by assignment, and there may be many *mesne* assignments: and the court held this to be an immaterial, and not barely an immaterial issue, because the fact found does not determine the right (1).

(1) It appears by the report in *Barnardiston*, that this was a motion in arrest of judgment, a verdict being found for the plaintiff. "But that it is a rule never to grant a repleader where the issue is found against the party tendering it." *Per Buller J.* in *Webster v. Bannister*, *Dougl.* 394. *Vide* 5 *Com. Dig.* Pleader (R. 14) 511.

Edgeworth *vers.* Smalldridge.

THE executor proved the will in the prerogative court, and a legatee sues him in the arches, which is a court held within the diocese of London, but belonging to the Archbishop of Canterbury. The defendant moved for a prohibition, he living in Hertfordshire, and therefore by the 23 H. 8. c. 9. ought not to be cited out of the diocese, this not being within any of the exceptions in the statute. *Sed per curiam*, The general saving as to the probate of wills extends to this, which is a consequence of their having jurisdiction to cite a man out of the diocese to prove a will; and if his living out of the diocese in which the will was proved be an objection to suing him there for a legacy, it will overthrow the jurisdiction of the spiritual court as to legacies: the executor by proving the will in the Arches submits to the jurisdiction of that court: it is the arches, and not the prerogative court, where the will is to be proved; and it is proper the executor should be sued in the court where he must render an account and get his discharge (1).

Executor may be sued for a legacy in that court where he proves the will, though he does not live in that diocese. Fitzg. 110. 1 Barn. B. R. 223. S. C.

[848]

(1) S. P. Anon. 1 Vent. 233. Per Holt C. J. *Machin v. Molton*, 1 Lord Raymond, 253. 12 Mod. 259. *Sed vide Hughes's case*, Godb. 214. Where the executors of a man who had lived in Somersetshire, were sued in the Arches for a legacy and a prohibi-

tion granted, and said *per Warburton J.* to have been agreed by all the Justices, that the exception in 23 H. 8. c. 9. extends only to probate of wills. But note it does not appear in this case where the will had been proved.

Dominus Rex *vers.* Kimberley.

THE defendant was brought up by *habeas corpus*, being committed to Woodstreet Counter, for feloniously marrying Bridget Reading, contrary to an Irish act of Parliament, 6 Ann. in order to be transmitted to Ireland to be tried, the offence being committed there.

Justices of peace in England may commit a person offending against the Irish law, in order to be sent over.

Fitzg. 111. 1 Barn. B. R. 225. S. C. 14 Vin. Abr. 369. pl. 47.

Strange moved that he might be discharged or bailed, insisting that justices of the peace in England are confined to act only as to such offences as are against the laws of England, and committed in England; and the proviso in the *habeas corpus* act gives no power as to offences in Ireland, but leaves it on the former practice.

Sed per curiam, It has been done in Colonel Lundy's case, 2 Vent. 314. and in 3 Keb. 785. the court refused to bail a man committed

committed for a murder in *Portugal*. If application is not made to have him sent over in a reasonable time; you may apply again.

Thereupon the defendant was remanded, and upon application to the Secretary of State, it was referred to Mr. Attorney General, to consider of the manner of sending him over: and upon an attendance by counsel, Mr. Attorney reported, that he might be taken from the *Counter* by a messenger, who should have a warrant to carry him to *Ireland*, whither he was carried, tried, condemned, and executed.

[849]

Between the Parishes of Elstead and Holliburne.

Renting above
10 *l.* per annum
in two parishes is
a settlement
where he lives.
2 Sess. Ca. p.
159, no. 130.
2 Bott. by Const.
167. pl. 204.
S. C.

So *Plaf.* 4 Geo. 2.
in the case of

Stapleford in *Leicestershire*, he took 3 *l.* per annum in the place he was certificated to; and 40 *l.* in the next parish, but lived where the 3 *l.* was, and held a settlement there. 1 Sess. Ca. p. 414. no. 323. 2 Bott. by Const. 214. pl. 237. S. C.

UPON an order of settlement, it was specially stated, that a man rented a house and land in *Elstead*, for which he paid 9 *l.* 10 *s.* per annum, and that he rented 3 *l.* per annum of the same person, but lying in the adjacent parish, that he lived in *Elstead*. And on consideration of the cases of *South Sydenham v. Lamerton*, ante 57. and *St. John's in Hertford v. the parish of Amwell*, ante 529. This was held to be settlement in the parish of *Elstead*.

Dominus Rex *vers.* Taylor.

Indictment too
general.

1 Barn. B. R.
229.

2 Sess. Ca. p.
22. no. 26. S. C.

AN indictment was quashed for generality, being *calumnatrix et communis et turbulenta pacis perturbatrix, ac sites, rixat et pugnas movit et incitavit, et quendam Josephum Atherton verbi, contumeliis, et opprobriis abusa fuit in domo ipsius J. A. (1).*

(1 *Rex v. M. Cooper*, post. 1246. 2 *Hawk. P. C. c.* 25. § 59, 322.

Whitlock *vers.* Humphreys.

Practice.

N. B. Both are
not to be inclu-
sive, for *Mugh.*
6 Geo. 2.

Frogmorton and

Nurdiffe, the countermand was 16th, and the assizes 19th, and held that costs should be paid.

UPON debate it was settled, that to save costs for not going on to trial, it would be sufficient to countermand notice in a town cause two days, and in a country cause four days before the assizes; and that it should be a general rule, without

considering

considering the charges or inconveniences in any particular case (1).

(1) But now by 14 Geo. 2. or *Westminster*, the notice of countermand must be at least six days before the intended trial, to save costs. *Vide Hullock on Costs* above 40 miles from either *London* 408.

Dominus Rex vers. Greenhaw.

A *Certiorari* was granted to remove an indictment for not doing the statute labour in the highway, on producing a precedent where it was done, in the case of *Rex v. Eachard*, 12 Geo. 1 (a).

Certiorari to remove indictment for not doing statute labour on the highway. not S. P.

(a) Rep. 1 Sess. Ca. 383. no. 508. but

Law vers. Davis.

UPON a special verdict in ejectment, the question was upon the following words, whether the son of the devisor took an estate for life, or an estate-tail: "*Item, I give and devise my lands in A. to my wife Anne for her life, and after her decease to my son Benjamin, and his heirs lawfully begotten, viz. the first, second, third, fourth, and every other son and sons successively lawfully to be begotten of the body of my said son Benjamin, and the heirs of the body of such first, second, third, fourth, and every other son and sons according to seniority; and in default of such issue, to my right heirs for ever.*" And it was held by all the court, that though the first words, if you stop at the *viz.* would carry an estate-tail to *Benjamin*, yet according to *Hob. 171.* what comes after *viz.* must be taken in to explain the former words, and by the last it appears he intended his son should not have it in his power to prevent the estate's being enjoyed by his children; or if he had none, from reverting to the right heirs of the devisor (1): and they said it

Devise to B. and his heirs lawfully begotten, viz. the first, second, and every other son of the body of B. and the heirs of the body of such first son, &c. B. takes only an estate for life.

L. Raym. 1561. 1 Barn. B. R. 238.

2 Eq. Abr. 315. pl. 28.

Fitzg. 112. S. C. [*850]

(1) The word "*heir*" accompanied with other words of limitation has been held to operate as a word of purchase in *Archer's case*. 1 Rep. 66. *Cheek v. Day*. 593. 2 Roll. Abr. 417. G. pl. 7. So the words *issue* or *issue male*. *Luddington v.* Vol. II.

Kime, Ld. Raym. 203. 1 Salt. 224. *Backhouse v. Wells*, 1 Eq. Ca. Abr. 184. pl. 27. *Doe ex dem. Barnard et al' v. Reason*, 3 Wilf. 244. *Doe v. Collis*, 4 Term Rep. 294. So likewise as in the present case the words *heirs* or *heirs of the body* &c. have been restrained by subsequent

it was no new thing in construction of wills, to let subsequent words intirely destroy the force of preceding ones, as in the common case of a devise to *A.* and his heirs, and if he dies without issue, remainder over: the first if alone would certainly carry a fee, but the latter qualify the former, and make it an estate-tail (2). So if a devise be to *A.* and his heirs, and for want of heirs then to *B.* the brother of *A.* these last words restrain the word *heirs* to mean only *heirs of the body*, because it is impossible that *A.* can want an heir general whilst he has a brother (3).

sequent words to signify a particular heir. In *Doe v. Laming*, 2 Burr. 1100. 1 Black. Rep. 145. *Lisle v. Gray*, 2 Lev. 223. *Raym.* 278. *Allgood v. Withers*, in Chan. 1735. Cited 2 Burr. 1107. 1 Vez. 150. *Fearne C. R.* 177. Et vide the opinion of *L. Kenyon*, C. J. in *Denn v. Puckry*, 5 Term Rep. 306. And see *Goodright v. Puleyn*, ante 729. and the note.

(2) *Chaldock v. Cowley*, Cro. Jac. 695. *Morgan et Uxor, v. Griffiths*, Corwp. 234. *Denn v. Shenton*, Corwp. 410. *Idle v. Coke*, 1 P. Wms. 71. *Porter v. Bradley*,

1 Term Rep. 143.

(3) *Webb v. Herring*, Cro. Jac. 415. *Parker v. Thacker*, 3 Lev. 74. *Tyte v. Willis*, Cas. temp. Talb. 1. *Allen v. Spendlove*, 1 Freem. 74. *Pickering v. Towers*, Amb. 363. *Ives v. Legge*, 3 Term Rep. 488. note. *Doe v. Perrin*, ib. 491. So also where the remainder is limited to the heirs of the testator himself, if they must also be heirs to the first devisee. *Nottingham v. Jennings*, 1 P. Wms. 23. Com. Rep. 81. See also 3 Com. Dig. tit. *Devise* (N. 5.) 428.

Holt vers. Ward.

Clarencieux is part of the name of the person. 1 Barn. B. R. 308, 247, S. C. 1 Com. Dig. Abatement (E. 20.) (E. 21.) p. 20, 21, (F. 19.) p. 39, 41.

THE plaintiff declared upon a contract of marriage against the defendant by the name of *Knox Ward*, Esq; The defendant pleaded in abatement, that the late King by letters patent under the great seal of Great Britain, dated 29 Junii anno regni sui undecimo, created him King at arms and principal herald of the South, East, and West parts of England; *et nomen ei imposuit Clarencieux*, to hold *tam diu quam se bene gereret*; unde he is not stiled *Clarencieux* in the bill, he prays it may abate. The plaintiff prays oyer of the letters patent, by which it appears he is stiled *Knox Ward*, Esq; before the words of creation, and then demurs. And on argument it was held by the court, that this must be taken, not as an addition, but as part of his name; according to Sir William Dethick's case, Cro. El. 542. 1 Lev. 248. and therefore they gave judgment to abate the bill. P. 937.

Dominus Rex *vers.* Acton.

THE defendant was the deputy keeper of the *Marshalsea* prison: and upon the address of the House of Commons was prosecuted for several murders supposed to have been committed by him on prisoners in his custody. He was tried on four several indictments, whereon the only question was, whether a place within the prison called the strong room was a proper place to confine disorderly prisoners in: and the jury upon all the four trials acquitted him, to the satisfaction of almost every body; and in consequence of these acquittals he was discharged. Presently after he was at liberty, a single justice of the peace, upon informations of a fifth person's having been put into the same strong room, and dying within a year after, thought fit to commit the defendant again for murder. And upon a *habeas corpus* *Strange pro def.* moved he might be admitted to bail, on producing copies of the informations, and affidavits of the former trials, and of the identical nature of the offences: but the court refused to look into the informations, though they were pressed with the Lord *Mabun's* case, *Salk.* 104, where they looked into the depositions taken by the coroner upon a motion to bail. And in the present case they remanded the defendant, who lay in prison till the next assizes, when the grand jury did him the justice to return the bill *ignoramus*, and he was discharged.

Court will not examine whether a man be committed for the same sort of offence of which he has been convicted, in order to bail him.

1 Barn. B. R. 250. S. C.

Skin. 603.

Lynne *vers.* Moody.

THE plaintiff brought trespass in *C. B.* for taking an excessive distress: and on error in *B. R.* the judgment was reversed, for that trespass would not lie where the entry at first was lawful, and here is nothing subsequent to make it a trespass, as there is where the distress is abused: the remedy ought to be by special action founded on the statute of *Marleberge*, 3 *Lev.* 48. for at common law the party might take a distress of more value than the rent, so as to make it more eligible for the party to redeem the goods by payment of the rent: here was some rent due, so a distress was lawful; and as it is but one act, it cannot be a trespass (1).

Trespass does not lie for taking an excessive distress. *Fitzg.* 85. S. C. fuller.

(1) *Hutchins v. Chambers*, 1 *Burr.* 579. S. P. But trespass will lie where the distress appears to be excessive both upon the face of it, and upon the pleadings, as where 6 ounces of gold and 100 ounces of silver were taken for 6s. 8d. and this is an exception to the general rule. *Moir v. Munday*, *H.* 28 G. 2. *B. R.* cited 1 *Burr.* 582. 590.

Dent *vers.* Prudence and Bond.

Churchwardens cannot commence a suit in their own names after their year is expired. But if commenced within, they may proceed in it after. 1 Bac. Abr. 376. 1 Barn's Eccl. Law 381. 3 Com. Dig. Eglise, (F. 3.) 656.

IN 1725, during the time *Prudence* and *Bond* were churchwardens of *St. Matthew's* in *Iswich*, a rate was made for the repairs of the church: and the appellant *Dent* not paying his share, the churchwardens after their year was out cite *Dent*, to compel a payment; and he appearing insisted to be dismissed, for that the suit was not begun within their time. But the Judge decreeing him to answer, he appealed to the Arches; where the Judge pronounced against the decree to answer, before there was a contestation of suit, but retained the cause. From thence *Dent* appealed to the Delegates. And upon a hearing 17 December 1729, before the bishops of *Norwich* and *Carlisle*, Chief Justice *Raymond*, Baron *Carter*, Sir *Henry Penrice*, and other doctors, it was determined, that *Dent* should be dismissed, and that *Prudence* and *Bond*, who can sue only in a politick capacity, could not institute any suit after that capacity was gone. It was agreed, that if the suit had been begun within their year, they might have proceeded in it after their year was out; it being *ex necessitate* to prevent people from delays, in order to wear out the year. So is 1 *Danv. Abr.* 788. *Cro. Eliz.* 145. 179. 1 *Leon.* 177. and Dr. *Prideaux's* directions to churchwardens 60, 61. But in regard this was not commenced till the year was out, and no precedent was shewn to warrant this suit, the appellant was dismissed. *Strange pro Dent.*

Hilary Term

3 Georgii 2 Regis. In B. R.

Sir Robert Raymond, Knt. Lord Chief Justice.

Sir Francis Page, Knt.

James Reynolds, Esq;

Sir Edmund Probyn, Knt.

Sir Philip Yorke, Knt. Attorney General.

Charles Talbot, Esq; Solicitor General.

} *Justices.*

Between the Parishes of Aldenham and Abbots Langley in com^t
Hertford.

UPON a special order of sessions, it was stated, that a poor person forty years ago came into a parish and lived there ever since; that he attended the leet, amended the highways, had a pew in the church, five children, and did watch and ward. *Sed per curiam*, Those are not annual offices in the parish, and the 1 Jac. 2. c. 17. was purposely made to avoid these constructive notices, and require notice in writing; and therefore they held it no settlement (1).

There cannot be a settlement by constructive notice.

2 Sess. Ca. p.
145. No. 127.
1 Barn. B. R.
138. 148. 285.
Foley 119 (a).
2 Bott by Const
125. pl. 163. S.C.

(a) Foley reports that it was held tantamount to a notice in writing, but all the other reports of the case are contra.

(1) *Vide Rex v. Inhabitants of Whittlesea*, 4 Term Rep. 808.

Coleman *vers.* Mawby et al'.

Execution of a writ of inquiry may be adjourned after it is entered upon. Post. 1259.

[854]

UPON executing a writ of inquiry before the Chief Justice, the plaintiff could not prove the quantity of goods for which the action was brought, for want of a servant who was absent through an apprehension they should not want his testimony. And upon consideration the Chief Justice held, that he might adjourn it to the next sittings, and accordingly the jury were adjourned over, the plaintiff submitting to pay costs: he compared it to the case of a coroner's inquest, or a commission of lunacy, where the jury are adjourned over several times, it being but an inquest of office. *Strange pro def'*.

Castell *vid.* *vers.* Bambridge et Corbet.

Motion in chancery to supersede a writ of appeal which ran *quia N. fecerit, &c.* Instead of *si N. fecerit nos &c.* refused.

Held in B. R. to be a good ground for Superfedeas, but motion denied there as not being in their power.

If A. carries his prisoner B. against his will to a house where he knows the small pox is, and that B. has not had it, or detains him there when he desires to be removed, and B. catch it, and dies thereby, it is murder.

Fitzg. 94.
1 Barn. B. R.
204. 240. 253.
275. S. C.
Moss. 199. S. C.
in Canc. upon the application to supersede the writ.

THE defendant *Bambridge* having been prosecuted on the report of the committee of the House of Commons for the murder of the plaintiff's husband, who was a prisoner in the *Fleet* under the custody of *Bambridge* the warden, and having on the trial been honourably acquitted upon the prosecutor's own evidence, was followed with an appeal, to which *Corbet*, who on the cross examination appeared to be a material witness for *Bambridge*, was now also made an appellee: and the writ of appeal running *quia Maria Castell vidua fecit* (1), *secur' de clamore suo prosequendo per Thom' Wagstaffe et Piston Stracy*, contrary to the usual form which is, *si* the appellant *fecerit nos* (i. e. the King) *secur'*, application was made to the Lord Chancellor *King*, to supersede this writ, upon affidavits that the appellees were both in custody upon it, but that no security had been given, and the writ reciting it as an act done before the emanation of it, the sheriff had not taken any, as he would have done if it had been put by way of condition *si fecerit*. And it was argued by me, that the statute *Westm. 2. c. 12.* giving the appellee a remedy against the appellant, her pledges, and abettors; it was not a matter of form, but security should be entered into by persons of ability. To which it was answered by Mr. Attorney General, that it was sufficient if there were pledges at any time before judgment. Sir T. Jones 154. 9 Co. Dr. Hussy's case. *Cro. Jac.* 413.

(1) *Fecerit*. See the other reports, and next page, line 7.

To this it was replied, that at that rate the appellee would never have any remedy against the pledges: for if he was convicted, he would be intitled to none; and if he was acquitted, the appellant would never pray judgment; and it would be an artifice to elude the law.

Notwithstanding all which the Chancellor would do nothing in it, but said if the *quia fecerit vos* were wrong, we might have advantage of it; and so refused to make any order.

Upon the first day of *Michaelmas* term last, the writ being returned, and the appellees both brought up by *habeas corpus*, and turned over to the King's Bench; it was there moved to have the proceedings set aside, upon the same affidavit of there being no pledges. And the court here were of opinion, it was a very good objection, and a foundation to supersede the writ: but then they said, it was not in their power, who were to take the writ as they found it, and not hear affidavits to contradict the suggestions of the writ; and therefore the having security being recited as an act done, they must take it to be so, and could not relieve.

[855]

Upon this the appeal was arraigned, setting forth that the appellant's husband was a prisoner in the *Fleet* under the custody of *Bambridge* the warden, who made an assault upon him, and contrary to his will carried him to the house of *Corbet*, a victualing-house within the *Fleet*, and there imprisoned him, where one *White* then lay ill of the small pox, which *Castell* had never had; that the appellees had notice of this, and were desired to suffer him to remove to another place in the prison, which they refused, and afterwards *Castell* fell ill of that distemper, and died in *Corbet's* house, whereby the count concludes, the appellees were guilty of his murder.

Without staying for a copy of the declaration the appellees instantly pleaded Not guilty, and their plea was rehearsed in *French*, and issue joined.

Then it was moved, that the appellees might be bailed. And upon debate the court were of opinion to bail *Bambridge*, and not *Corbet*. And the reason they gave was, that *Bambridge* had been acquitted, which was a strong presumption of innocence; and the Judge before whom he was tried had certified that he was very well satisfied with the verdict: and they said they would bail in all cases after an acquittal on the indictment, unless the Judge was dissatisfied with the acquittal; and that was the reason they denied to bail in *Slaughterford's* case, because *Holt*

Appellee bailed
having been
acquitted upon
an indictment.
Vide post. 858.

Chief Justice had sent out the jury again to consider whether they would stand to their verdict of acquittal; and when they insisted upon it, he himself ordered the appeal.

Two bail *corpus pro corpore*, and also in 1000*l.* where the appeal was by writ on the civil side. But four where it comes on the crown side by *certiorari*.
Post. 911.

But as to *Corbet* there was no foundation to bail, for they denied that it was of course to bail in an appeal. So *Bambridge* was bailed by two persons *corpus pro corpore*, who justified in 1000*l.* each. And it was agreed, that in an appeal by writ on the civil side two bail only are required; but had it come on the crown side by *certiorari*, there must have been four.

[856]

Then it was moved to fix a time for the trial, the appellees offering to take short notice. But it being by original, there was a necessity to have fifteen days between the *teste* and the return of the *disfringas*, and they could not be tried on the *venire*, because being in *London*, there could be no trial at bar, (the citizens not being to be brought out of the city) and as it must be tried at *nisi prius*, there must be a *disfringas*.

It is not necessary to take out the *venire*, and make it returnable as soon as may be, though it must bear *teste* the day issue is joined.

Towards the latter end of the term it was moved that the appellees might be discharged, there being a discontinuance, for that no *venire* had been taken out: and in appeals, which are a recent prosecution, every delay is a discontinuance: and *Cro. Jac.* 283. *Yelv.* 204. were cited. But upon consideration the court held, that it was not necessary to take out the writ and make it returnable the soonest it might be, though it must bear *teste* the day that issue is joined: and then the appellant took out a *venire*, *teste* 23 *October* and returnable 25 *November*, which the court looked upon as an affected delay, and therefore admitted the other appellee *Corbet* to bail: they said it appeared he might have been tried the sitting after the term, and then upon his acquittal he must have been *instantanter* discharged by the Judge of *nisi prius*, according to the statute 14 *H. 6. c. 1. (a)*

(a) Post. 858.

Court will not make a rule upon the keeper of the records at the *Old Bailey* to attend the trial of an appeal with the record of acquittal on an indictment for the same fact. It would not be evidence.

Quaker no witness in an appeal.

Both being thus out upon bail, appeared on the several continuance days according to their recognizance, and the appellant also appeared. And the beginning of this term the appellees moved for a rule on Mr. *Tanner* the officer who keeps the records at the *Old Bailey*, to attend the trial with the record of *Bambridge's* acquittal, he not being allowed a copy of it. But the court refused to make any rule, and said if it was brought, it could be no evidence.

Upon the 26th of *January* the trial came on at *Guildhall* before the Chief Justice, and in the course of the evidence the appellants' counsel called a quaker, and insisted that this is a civil suit, in which he might be a witness. But the Chief Justice said

said, it was to this purpose a criminal proceeding, and therefore he could not be a witness (1).

After a long examination the Chief Justice directed the jury, that if they believed *Castell* was carried to *Corbet's* against his consent, and was there so detained, that *Bambridge* and *Corbet* knew the small pox was there, that *Castell* had not had it, but feared it, and desired to be removed, or not be carried there at all, that he caught the small pox of *White*, and died thereof; then the appellees would be guilty of murder (2); but if any one of these facts were not proved to the satisfaction of the jury, they ought to be acquitted. And there being no pretence to charge either of the appellees, the jury brought them in Not guilty.

And the Chief Justice being moved to proceed against the appellant, who was in court, upon the statute *West. 2. c. 12.* said, he was only to try the issue, and that the application was proper above, or by writ of conspiracy, and all he could do was to record the verdict.

[857]

Upon 3 Feb. following the appellees appeared in court, and having given a rule upon the *poslea*, which they then produced, and no body appearing to say any thing against them, they were discharged (3). *Strange pro appellatis.*

- (1) *Vide Acheson v. Everitt*, 872. *Rex v. Wych*, *post.* 884. (2) *Rex v. Huggins*, *post.* 884. *Fost. Cr. Law* 322. (3) See a case circumstantially describing the form of proceeding in an appeal. *Bigby v. Kennedy*, 5 Burr. 2643. 2 Black. Rep. 710. S. C.

Gifford *vers* Lechmere.

THE venue was changed from *London* to *Middlesex* on my motion (1).

Venue changed from *London* to *Middlesex*. 1 Barn. B. R. 283. S. C.

- (1) According to the report in *Barnard*, the court refused it on the circumstances of the case.

Dominus Rex *vers* Bettelworth.

A *Mandamus* was granted to Dr. *Bettelworth* as judge of the prerogative court of *Canterbury*, to grant probate of the will of the Earl of *Londonderry*, to the executors therein named

There need not be a four days rule on *mandamus*'s in town. *Fitzg.* 125. 1 Barn. B. R. 280. 291. 292. 424. S. C.

The spiritual court cannot refuse to grant probate pending a commission of appraisement. (2).

named (1). The day after it was returnable a rule was prayed for the doctor to return the writ *instante*. And *Strange* for the doctor insisted, that it ought to be a four days rule: but upon conference with the clerks of the crown-office, the court was of opinion, that there was no stated time for these rules, but that the distance of place ought to be the guide; and therefore they ordered the writ should be returned the next day. Whereupon the doctor returned, that it is the custom and practice of the prerogative court, that if any creditor of the deceased enters a *caveat* against granting probate, and swears himself to be a creditor, there goes out a commission of appraisement, till the return whereof the judge has not used or ought to grant any probate; then he sets out, that two creditors, who swore to their debts, entered a *caveat* and prayed a commission of appraisement, which was decreed and issued, but is not yet returnable; *et ea de causa* he cannot as yet grant a probate.

Upon argument the court held the return to be ill, for that the judge can only stay the probate where there is a contest about the validity of the will. This commission of appraisement can be of no use but to spend money, and delay the executor from getting in the effects of the testator. And by 21 H. 8. c. 5. the probate is to be granted *with convenient speed, without any frustratory delay*; and the ecclesiastical court shall never be suffered to set up their practice against the law of the land, a peremptory *mandamus* was therefore granted.

[858]

If the writ state that the testator had *bona notabilia* in divers dioceses it need not state them to be within the province of the prerogative judge, especially if he has once acted.

Exception was taken to the writ, that it was only that the Earl had *bona notabilia* at *Westminster*, and in divers dioceses, but do not say within the province of *Canterbury*. But the court over-ruled it, saying they would not presume an inferior jurisdiction, and it appeared he had already done some acts of office as the prerogative Judge, and shall not be received now to say it does not appear he has any jurisdiction. *Strange pro def.*

(1) *Mandamus* refused when the executors had renounced, for it is not a case within the statutes. 2 *Kely*. 139. *Vide post*. 891. *Dakin v. Munn*, Sir T. Raym. 255. (2) *Rex v. Dr. Bettsworth*, *Rex v. Bettsworth*, *post*. 956. *East*. 10 Geo. 2. *And*. 366. n. d. S. P.

Ragg *vers.* King.

A Prohibition was granted to a suit for wages by the master in the admiralty (1), but denied as to the boatswain, who is to be considered as a common mariner. *Salk.* 33. (a)

Boatswain may sue in the admiralty for wages. 1 Barn. B. R. 297. S. C. (a) Holt 595. Carth. 578. 12 Mod. 405. S. C.

(1) *Read v. Chapman*, *post.* 937. S. P. *Wilkins v. Carmichael*, *Doug.* 101.

Dickinson *vers.* Fisher.

IT was held, that as the defendant must move to change the venue before plea pleaded, so the plaintiff must in like manner move to discharge the rule on undertaking to give material evidence before replication or plea (1). *Quare tamen* as to the plea, for the plaintiff may not have time, because the defendant may give a plea at the same time he serves the rule to change the venue. *Practice.*

(1) That plaintiff may bring back the venue after plea pleaded *vide Bruckshaw v. Hopkins*, *Cowp.* 409. *Vide also post.* 1162. 1202.

Dominus Rex *vers.* Hawks.

A Conviction for killing a deer was quashed, because it was only *convictus est*, without any judgment *quod forisfaciat* (1).

In convictions there must be a judgment, *quod forisfaciat*. *Fitzg.* 124. more full 1 Barn. B. R. 112. 300. S. C.

(1) *Rex v. Elwell*, *ante* 794. the cases there cited. S. P. *Rex v. Vipont*, 2 Burr. 1163. and *v. Chandler*, 1 *Salk.* 378. *contra.*

Pyle *vers.* Grant.

IN appeal of murder, it appeared the defendant was convicted on the indictment, but pardoned on the report of the judge, and after issue joined on the appeal, he moved to be bailed, which was refused, the presumption being against him, contrary to *Bambridge's* case. But a trial at bar being ordered this term, and the appellant having taken no step to bring it on, but upon the day appointed moving to put it off to a further day; the court

Appellee not bailable if convicted on the indictment though pardoned. 1 Barn. B. R. 255. 260. 276. S. C. *Ante* 402. 855.

court took the appellee's own recognizance in 500*l.* to appear the last day of the term; and ordered that nothing should be done as previous to the day appointed for the trial; that if there was a discontinuance, the appellee might take advantage of it. And the last day of the term he was discharged, the appellant not appearing. *Strange pro appellante.*

Wilson versus Poulter.

A. knowing of *B.*'s bankruptcy at the request of *B.*'s wife and with his money buys 30 *South-Sea* bonds and gives them to her. *B.*'s assignee seizes 22 as part of the bankrupt's estate, he cannot maintain trover against *A.* for the money with which he purchased the other eight. 1 Barn. B. R. 77, 118, 136, 142, 284. S. C.

TROVER by the plaintiff as administratrix of *William Wilson* the assignee of the effects of *Edward Poulter* a bankrupt, for ready money, *ad damnum*, 6000*l.* Upon Not guilty a special case was made for the opinion of the court.

That *Edward Poulter* on 7 May 1724. became a bankrupt, and a commission issued against him 3 August following, by virtue of which he was declared a bankrupt, and the plaintiff's intestate chosen assignee, and had an assignment.

That 16 June 1724. the bankrupt's wife brought to the defendant 3082*l.* 3*s.* 11*d.* of the bankrupt's money, and desired the defendant to buy some *India* and *South-Sea* bonds with it. That the defendant knowing of the bankruptcy, and that the money was part of the bankrupt's effects, received the same, and on the said 16 June, and 23 June, with part of the said money bought twenty *South-Sea* and *India* bonds, and *John Abington* the defendant's servant, by defendant's order, with other part of the money bought ten bonds more, and defendant delivered all the thirty to the bankrupt's wife. That on 2 September 1724. the assignee having notice where some of the effects were deposited by the wife, seized twenty-two of the bonds for the benefit of the creditors, and accepted them as part of the bankrupt's estate. And upon this state of the case the point reserved was, whether the defendant is liable in this action to make satisfaction for the money with which the eight bonds that did not come to the hands of the assignee were purchased.

Strange pro quer' argued, that here was a plain property in the plaintiff and a conversion in the defendant. In order to make it out, there are some things stated, which should be laid out in the case. 1. That at the time of receiving the money and buying the bonds, there was no commission; the transaction by defendant being in June, and the commission and assignment not till August following. But as to this it is stated that he became a bankrupt 7 May before, and from that time the property of the assignee

assignee commences (1). 2. That ten of the bonds were bought by another person, one *John Abington*. But this is stated to have been done by the defendant's order, and with part of the money received by him of the bankrupt's wife, and that the defendant had the bonds of his servant, and delivered them to the wife, by which he has made it his own act. 3. The seizing twenty-two of the bonds by virtue of the commission for the benefit of the creditors, and accepting them as part of the bankrupt's estate. This is not stated to be done in affirmance, and by way of authenticating the act done by the defendant in purchasing these bonds; but only to lessen the damages, which otherwise must be given for all the money, and to shew that in point of justice and equity the plaintiff is intitled only to a satisfaction for the money with which the eight bonds, not yet brought to light, were purchased; for if the plaintiff had taken a verdict for the whole, she must have been compelled in a court of equity, either to deliver up the twenty-two bonds, or abate for them; and it is in case and favour of the defendant, who had parted with the possession, to take these bonds out of the hands of a third person, and at the same time allow him the benefit of the seizure. The purchase of every bond is a distinct act, and where that which is the produce of my money is to be come at, I have my election to sue for the money, or the thing so purchased with my money. *Hussy v. Phydall*, 12 W. 3. (a) If the bankrupt sells goods, the assignee may bring trover for the goods, or affirm the sale and sue for the money; and if the bankrupt does so in two instances, the assignee is not bound to make one uniform election for both cases; but as they are distinct and independant, he may sue one vendee for the money, and as to the other may disaffirm the sale and maintain trover. In this case it is stated, that the bonds were purchased at different times, some upon the 16th, and others upon the 23 June; not that it is material what he did with the money, for as he was possessed of the money of the assignees, he can no otherwise discharge himself of it, than by a payment to them. 4. The danger that in general will attend brokers and others, if they should be charged merely on account of the money's passing through their hands, may be laid out of the case. If they do not know it, it may be hard; but if they know it they ought to be charged, and there is express knowledge stated in this case, not only of the

[860]

(a) Rep. 12.
Mod. 324.
Holt 95.
3 Salk. 59.

(1) See *Cooke's Bank. Laws*, 652 to 688. *Bull. L. N. P.* 41.

bankruptcy,

bankruptcy, but that the money was the bankrupt's effects (2).

[861]

If these things are laid out of the case, there will then be a plain property in this money in the plaintiff, and a conversion in the defendant. It will be no more than this: a man knowing of the bankruptcy, and having money or goods of the assignee, disposes of them without his authority; and it will not at all differ from the case of *Parker v. Godin*, M. 2 Geo. 2. ante 813. where a bankrupt left plate with his wife, who to raise money delivered it to her servant, who went along with the defendant to a broker's door, and there the defendant took the plate and went into the shop and pawned it in his own name, and gave his own note to repay the money, and on receipt of it went back and paid the money to the bankrupt's wife: and in trover for the plate, it was held that he was liable, though he did not apply the money to his own use. He was charged with the plate as having had it in his custody, and not delivering it to the assignee; and there the plate was forth-coming, but these eight bonds are not. There the directions were to pawn, here to buy. There the produce of the plate was delivered to the wife, here the produce of the money was delivered to her. In neither case had the defendant any advantage; if any difference, his disadvantage was greater than there here, because there he had by note subjected himself to pay the money.

It may be said he laid out the money as directed, and pursued his authority. To which it is answered, that no body could give him any directions or authority but the assignee, and he was not privy to the transaction; for though in another case it shall be taken that the wife acts as a servant, yet that is only where the husband himself has power; and though the assignee comes in in privy under the bankrupt, yet that is only as to all transactions previous to the bankruptcy; but no act of the bankrupt subsequent can bind the assignee, there being then no privy between them.

The court without hearing any argument of the other side, declared, that if the four things insisted on for the plaintiff were all to be laid out of the case; the conclusion drawn from thence, and the application of the case of *Parker v. Godin* would be right; and as to the first, second, and fourth things, they thought they ought to have no weight against the plaintiff; but as to the

(2) *Vernon v. Hankey*, 2 Term Rep. 113. 3 Bro. Chan. Ca. 318. and *Cooke's Bank. Law*, 3 ed. ut supra.

third, they were all very clear in opinion, that the seizing part of the bonds was an affirmance of the defendant's act in laying out the money; and that the plaintiff therefore could not avow the act as to part, and disavow it for the rest (3). So the defendant had judgment.

(3) *Clarke v. Ryall*, 1 Black. whether the purchase of India 642. *Vernon et al v. Hanson*, 2 and South sea bonds was a conversion under the circumstances of Term Rep. 287. In 1 Barn. 284. the court are said to have doubted this case.

Sir John Fortescue Aland *vers.* Mason.

Error of a judgment in *B. R.* in Ireland on a writ of error there brought to reverse a common recovery. The defendant pleads infancy, and prays that the parol may demur; upon which judgment is entered, *quod loquela remaneat* untill his full age; of which judgment a writ of error being now brought, the defendant comes in again and pleads the same plea, and prays that the parol upon the writ of error in *England* may demur. To this plea the plaintiff in error demurs, and,

**Filmer pro quer* in errore argued, that whatever may be the validity of the first plea, yet the second will be ill; because that is to bar the plaintiff of his right to dispute the validity of the first plea, and is contrary to the maxim laid down by Lord Bacon in his *Elements* 6, 7. *Non valet exceptio ejusdem rei cujus petitur dissolutio*: and it is a rule, that you shall not plead a matter which will come in judgment upon the first suit. 7 H. 6. 44. Bro. Error 70. Co. Litt. 128. a. If the defendant had to this second writ of error pleaded in *nullo est erratum*, he would still have had the advantage of his principal point, whether the parol shall demur or not.

Where error is brought on a judgment that the parol shall demur, the nonage cannot be pleaded again to it.

Error in *B. R.* in Ireland to reverse a common recovery suffered there in *C. B.*

The tenant pleads infancy and that he is in by descent, and prays the parol may demur, judgment accordingly, which is affirmed upon error here, in *B. R.* He may plead thus, after an imparlance and the plea will be good although it does not mention the infant's age.

L. Raym. 1433. 1 Barn. R. R. 5, 100, 176, 231, 238. Fitzg. 114. Vide 5 Com. Dig. Infant. (D. 1.) 624. 3 Bac. Abr. Infancy. (L. 1.) 161. S. C. Post. 1253.

It [*862]

Et per curiam, The plea in Ireland was very proper, but the other party has a right to dispute the validity of the judgment given upon it. Now if this second plea be allowed, the defendant will have had all the advantage of his nonage, though it should happen to be a case (as in dower) where he is not intitled to his age. If a writ of error be brought to reverse a fine, the fine itself shall not be pleaded in bar. Sir Thomas Jones 181. The defendant might safely have pleaded in *nullo est erratum*, and that would not have been a waiver of his first plea.

It was argued a second time in *Hil. sequen'*, when the court continuing of the same opinion, there was a judgment *quod def' ad errores prad' ulterius respondeat*.

The plea of nonage in *England* having been over-ruled; it came now to be debated on the validity of the judgment of *B. R.* in *Ireland*, by which the parol was to demur, till the infant came of age, and the court being of opinion, that it was proper to consider that as a previous question to the errors in the common recovery, if there were any, *Strange pro quer' in errore* argued, that the plea was ill both as to the matter, and as to the manner of it.

As to the matter of it: he is not intitled to his age, because by his own shewing he is in by descent, and therefore say some books he shall not have his age. 47 *Aff. pl.* 4. 1 *Roll. Abr.* 139. *pl.* 33. "If a man brings a writ of error against the heir of him that recovered, being within age, and in by descent of the land, the parol shall not demur for his nonage, though perhaps he hath a release or other matter to bar the plaintiff, which he hath not knowledge to plead within age."

Besides, he is not intitled to have his age in this case, because the error assigned is error in law, and not in fact: and that is the distinction taken by justice *Dodderidge* in 3 *Bull.* 139. where he says, he shall have his age against an error in fact, because he may not be supposed to know his case well enough to answer the matter of fact; but as to error in law, it is a matter that never will lie in his cognizance; the Judges are to look into it for him, and they can as well judge upon the record now, as when the defendant comes of age.

[863]

But supposing this was a case wherein the defendant is intitled to his age, yet the manner of the plea is ill. 1. As it is a dilatory, it ought not to have been pleaded after an imparlance. 2. It does not mention of what age the infant is. In *Co. Ent.* 256. the age is mentioned, and there is a very good reason it should be so; because at his full age a resummons must issue, and as this must be founded upon the record, it ought to appear to the court, when it is the proper time to award such a writ.

Sed per curiam, His being in by descent is the strongest reason for having his age, and though the book cited is to the contrary, yet in the same page is a case directly against it, and the current of authorities are so. And as to justice *Dodderidge's* distinction, there is nothing in it, for a release of errors if he knew how to

Hilary Term 3 Geo. 2.

plead it, would defend him against errors in law as well as in fact. As to the form of the plea we think it well enough, and therefore the judgment for the parol to demur must be affirmed.

N. B. A fault in the writ of error was amended without costs, the statute not giving costs on amending, as it does on quashing (1).

(1) *Marret v. Gardner, Fitz.* the affignment of errors, it is with costs. *Id.*
268, S. P. post. 902. But said that if the rule be also to amend



Easter Term

3 Georgii 2. Regis. In B. R.

Sir Robert Raymond, Knt. Lord Chief Justice.

Sir Francis Page, Knt.

James Reynolds, Esq.

Sir Edmund Probyn, Knt.

} *Justices.*

Sir Philip Yorke, Knt. Attorney General.

Charles Talbot, Esq. Solicitor General.

The Mayor of Basingstoke vers. Bonner.

An attorney of
C. B. must plead
his privilege in
B. R. and can-
not be discharged
on common bail.
L. Raym. 1567.
S. C.

Accord.
Barn. B. R.
300. S. C.

But said that de-
fendant was dis-
charged on filing
common bail and
producing his
certificate.

ABNEY moved, that the defendant being an attorney of
C. B. might be discharged on common bail; suggesting it
to be the practice of C. B. to pay that respect to the attorneys of
B. R. if they are sued there, and cited 2 *Mod.* 181. 1 *Mod.* 10
Salk. 544.

Strange contra asserted, that there was no such practice in
C. B. and as to the case in 2 *Mod.* it is so far from being an
authority for the defendant, that it appears the Common Pleas
did not discharge him, though arrested in the Palace-yard, but
sent him up to the King's Bench. And the other two cases are
of attorneys of the same court, who no doubt are to be discharged
on common bail. *Et per curiam*, The defendant must have
special

special bail here, and may plead his privilege in abatement after (1).

Accordingly he put in bail, and pleaded his privilege; to which the plaintiff demurred, and objected that he had not averred himself to be an attorney at the time of filing the bill, but only at the time of pleading; it is *ante exhibitionem billa fecit* (instead of *fuit*) *et adhuc existit un' attornatorum de C. B.* And for this fault the court held it ill, and awarded a *respondes postea*.

[865]

(1) *Snee v. Humphreys*, 1 *Wils.* 206. S. P. But where an attorney is arrested by *latitat* in his own court it is a motion of course to discharge him on filing common bail. *Wheeler's case*. 1 *Wils.* 298. *Imp. Prac. K. B.* 474. ed. 1791. *Et vide Croftley v. Shaw*, 2 *Black.* 1085.

Dominus Rex vers. Fisher — et *Saunders*.

IN the case of *Fisher* judgment was arrested after a verdict; and in the case of *Saunders* an indictment was quashed; being taken at an adjourned sessions, and it not appearing what day the original sessions began, to bring it within the time prescribed by the statute (1). *Strange pro rege*.

Where an indictment is found at an adjourned sessions, it must appear the sessions began in time, 3 *Seff. Ca. p.* 327. S. C.

29. no. 25. 1 *Barn. K. B.* 278,

(1) *Vide Rex v. Walker*, 2 *Seff. Cas.* 17. pl. 21.

Hatton vers. Hatton.

STRANGE moved for a prohibition to the prerogative court, in a suit there instituted by the next of kin against the executor, to make distribution of the surplus, there being a specific legacy to the executor; for that although there have been variety of decisions upon this point in courts of equity, where they have sometimes held the executor to be a trustee for the next of kin as to the surplus; yet there was no instance of the spiritual court's judging of a trust, or setting up any interest contrary to the common law. He insisted, that in the case of a

Where there is a legacy to the executor, the spiritual court cannot entertain a suit for distribution of the surplus among the next of kin under the statute (1). *Fitzg.* 126. 1 *Barn. B. R.* 377, 329. S. C.

(1) *Rex v. Raines*, 1 *Ld. Raym.* 363. *Edwards v. Freeman*, 2 *P. Wms.* 441.

(a) 1 L. Raym.
36.
2 P. Wms. 7.
S. C.

will the Judge below is *functus officio*, when he has granted probate, as to all purposes but calling for an inventory, according to the statute 21 H. 8. c. 5. and he cited 5 Mod. 247. *Patt v. Smith* (a), where the testator gave 5 l. to the executor, and the daughter cited him to make distribution; and a prohibition was granted. And in a report of the same case in *Cumb.* 378. it is said *per Holt C. J.* they never pretended to distribution in the case of an executor; and they only do it in the case of an administrator by virtue of the statute, and he denied the notion in 2 *Inst.* 33. that executors must divide.

Dr. *Sayer e contra* would fain have maintained, that the spiritual court had concurrent jurisdiction with the court of Chancery in this case, as well as in legacies; and insisted that this is a partial intestacy as to the surplus. But the court was clearly of opinion, the spiritual court could not intermeddle: and said that in case of an intestacy they used to be prohibited, as in *Carter* 125, 1 *Lev.* 233. and the statute of distributions enlarged, and not barely confirmed their power; as appears by the history of that statute in *Raym.* 496, &c.

[366]

The rule for a prohibition was made absolute, and the court offered, that if the common lawyers on the doctor's side, who were *Reeve*, *Lee* and *Fazakerley*, would say they thought there was any thing in it, the plaintiff should declare in prohibition; but they declined it.

Dominus Rex *vers.* Martham Bryan.

Intent to defraud not indictable (1).
2 Sess. Ca. p.
22. no. 27.
2 Barn. B. R.
298, 331.

(a) 2 L. Raym.
1013. S. C.
(b) 2 L. Raym.
1079. S. C.

INDICTMENT, setting forth that the defendant came to the shop of *Langley* a mercer, and affirmed she was a servant to the Countess of *Pomfret*, and was sent by her from *St. James's* to fetch silks for the Queen, endeavouring thereby to defraud the said *Langley*; whereas in fact she was no servant of the Countess of *Pomfret*, nor was sent upon the Queen's account. After verdict for the King, it was moved in arrest of judgment by Mr. *Fazakerley*, that there being no false tokens, or any actual fraud committed, there was no offence indictable; and he cited *Salk.* 379. 5 *Mod.* 18. 6 *Mod.* 105 (a), 111, 301 (b), 311 (1).

Reeve contra, would have maintained it as being a fraud concerning publick traffick; and though no harm was done, yet an

(1) *Vide* 1 *Hawk.* P. C. c. 71. *Rex v. Chunnell*, ante 793. determined upon the same principle.
J. 2 p. 343. S. P. and 30 Geo. 2.
p. 24. and see the cases cited in

Easter Term 3 Geo. 2.

indictment would lie, as in the case in 1 Vent. 304. of an indictment for a conspiracy to charge a man with a bastard child, when there really was no child, so that the party could not suffer.

Sed per curiam, There the conspiracy was the crime; and an indictment will lie for that, though it be to do a lawful act: this is no more than telling a lie, and no instance being shewn to maintain it, the judgment must be arrested.

Stewart *vers.* Smith.

STRANGE took an exception to the *scire facias* against bail, that on setting out the *capias ad satisfaciendum* in the replication, it appeared the *scire facias* bore *lesse* the very day the *capias ad satisfaciendum* was returnable; and would have had it to be ill, because the *scire facias* cannot issue till a *capias ad satisfaciendum* is returned and filed; which could not be presumed to have been done the very day of the return. But the court said it was well enough, and gave judgment for the plaintiff.

Scire facias against bail may be *less* the day of the return of the *capias ad satisfaciendum*.
L. Raym. 1567.
S. C.

Sweetapple *vers.* Goodfellow.

[867]

IT was held that a writ of error is so absolutely a *superfedeas*, that the plaintiff cannot so much as take out a *capias ad satisfaciendum*, and return *non est inventus*, in order to proceed against the bail (1).

Writ of error where a *superfedeas*.
Fitz. 174.
1 Barn. B. R.

334. S. C. 39 Hen. 6. 30. 2.

(1) *Smith v. Nicholson*, *post*. 1186. *Perry v. Campbell et al'*, 3 Term Rep. 390. S. P.

Tully *vers.* Sparkes.

DEBT upon a bond against the defendant *Sparkes* and *Moy* as executors of *William Donelson*, setting forth that *Donelson* entered into a bond in 800*l.* conditioned, that if he, his executor to do an act (1). In debt if there be no writ of inquiry to ascertain the damages sustained by the detention of the debt, *quære*, whether they as well as the costs of suit should be stated to be given with the assent of the plaintiff. Record and transcript amended in B. R. after error brought in the Exchequer Chamber. 1 Barn. B. R. 59, 79, 325, 335, 343. 2 Eq. Abr. 105. c. 5 in 2. heirs.

The bankruptcy of the obligor does not discharge a bond conditioned for

(1) *Ex parte Cork*, 7 Vin. 72. *Ex parte Grooms*, 1 Atk. 115. *Donelson*, 7. *Ex parte King*, *Davies* 254. *Wills* 524. *Ex parte Winchester*, 1 Atk.

heirs, executors or administrators should pay to the plaintiff 400*l.* within two months after the death of the obligor in case he shall marry *Martha Latimer* and she shall survive him, then the bond to be void. The plaintiff then avers, that the marriage was had and the wife survived, and the defendants were made executors; but neither they nor the heir have paid the money according to the condition. The defendant *May* pleads that he never administered or proved the will, and the plaintiff as to him enters a *nolle prosequi*. The other defendant *Sparkes* prays *oyer* of the bond, which is set out without the condition; and then pleads, that the obligor was a trader, and after entering into the bond committed an act of bankruptcy, whereupon the creditors petitioned, had a commission, and he was declared a bankrupt, and had his certificate, which was confirmed. To this the plaintiff, having inrolled the condition of the bond *in hac verba*, demurred; and the defendant joined in demurrer.

Strange pro quer' argued, that the plea was ill: he laid it down as a general rule, that a creditor shall not be barred *quoad* a demand which he cannot come into a distribution for; although to some purposes a bond is *debitum in presenti*, yet this is to be considered upon the reason of the several acts relating to bankrupts, which plainly design to bar no body but those who can seek relief under the commission. And this is proved by the statute 7 Geo. 1. c. 31. which recites the inconvenience, that creditors by bond or note payable at a future day could not prove their debts before the commissioners, and therefore gives a liberty to prove the debt, and have a distribution, making a rebate of in-

1 Atk. 117. But if the husband gives bond to pay a sum of money in his life-time to trustees, to be laid out upon trusts declared in marriage articles, and becomes bankrupt, the trustees may prove this as a debt under the commission. *Ex parte Winchester*, 1 Atk. 117. *Ex parte Smith*, *Cooke's Bank. Laws* 3 ed. 267. *Ex parte Brown*, *ib.* 271. *Ex parte Mitford*, 1 Bro. Chan. Ca. 348. So also if the bond be conditioned to pay the principal after the death of the obligor, and interest at stated times during his life, and the condition is forfeited before bankruptcy. *Ex parte Winchester*, *Davies* 530. 1 Atk. 116. But

where the contingency upon which the bond is to be forfeited, is the insolvency or bankruptcy of the husband, the trustees cannot prove. *Ex parte Hill*. *Ex parte Matthews*, *Cooke's Bank. Laws* 291. 3 ed. *Ex parte Bennet*, *ib.* 293. *Ex parte Greenway*, 1 Atk. 113. *Ex parte Mitchell*, 1 Atk. 120. *Anon.* 3 Will. 271. But the wife's fortune may be settled on the husband until his failure, and then to her separate use. *Lockyer v. Savage*, *post.* 947. For other cases of contingent debts *vide Hockley v. Merry*, *post.* 1043. and *Cruikshank v. Thompson*, *post.* 1160.

terest, where the money is payable at a certain future day, and where the debt arose by the sale of goods. That it could not be done before this act, is proved by the case of *Callowel v. Clutterbuck*, Pasch. 10 Ann. B. R. which was a note dated 1 January, payable one month after date, the party became a bankrupt 10 January; and it was held that the creditor could not come in for a distribution, for though it was *debitum in presenti*, yet the cause of action did not accrue until after the act of bankruptcy.

[368]

This demand depends on two contingencies, whether it shall ever arise; first the marriage taking effect, and secondly, the wife's surviving; and it is impossible to make a rebate of interest, there being no certain time to compute it from. If the bankrupt himself would discharge himself, his plea must be that the cause of action arose before he became a bankrupt; but could that be said in this case?

Jocelyn contra insisted, that the words of 5 Geo. 1. c. 24. discharged the bankrupt from all debts *contracted due or owing*, in the disjunctive, and that this is certainly a debt contracted: were it a bond to the bankrupt on such a contingency, it would certainly be assignable: and hereupon he entered into a long argument, to prove that the condition was no part of the bond, but only stayeth the effect of it. *Sed per curiam*, As no cause of action could accrue upon this bond during the life of the bankrupt, the obligee could never come in for a distribution, and therefore shall not be barred: the statute 7 Geo. has not taken in this case, but explains very well what the law is concerning it; and the word *debt* in 5 Geo. must be expounded a *demandable debt*; whereas it could never appear during the life of the bankrupt, whether this would ever come to be a charge upon his estate.

Upon this judgment was given for the plaintiff, and the defendant brought a writ of error in the exchequer chamber, where it was argued again by *Jocelyn* and *Strange*. And Mr. *Jocelyn*, besides his argument upon the merits, took an exception to the form of the judgment, that the damages and costs *occasione detentionis debiti* are not said to be given *ex assensu* of the plaintiff; and for this he cited 1 Roll. Abr. 771.

Strange contra argued, that whether it was right or wrong, the defendant could not object it, for that he has no election as the plaintiff has: the plaintiff, if he do not like the damages given by the court, may insist upon a writ of inquiry, 2 Sourd. 66. But when he waives that, and takes judgment for the damages and costs assessed by the court, it amounts to a consent

to stand by them. And agreeably to this reasoning the objection was over-ruled in *Comb.* 220.

[869]

But if there was any thing in the objection, he insisted it was cured by the 16 & 17 *Car.* 2. c. 8. which says there shall be no reversal by reason that the costs in any judgment whatsoever are not entred to be by consent of the plaintiff.

Ante 808.

He likewise insisted, that if it was wrong, there might be a reversal only as to the damages and costs, and the judgment be affirmed as to the debt; according to the case of *Henriques v. the Dutch West-India company.* *Trin.* 2 *Geo.* 2.

Williams 497.
Moseley 28. 79.
S. C.

And as to the merits he repeated his former argument, and cited two cases in chancery, that had been determined since the judgment of *B. R.* viz. 23 December 1728. when the Lord Chancellor having taken time to consider of three petitions *ex parte Channel, ex parte Gazelet, and ex parte Bateman,* delivered his opinion, that upon a bottomree bond (2), where the ship was not yet returned, and upon two bonds given on marriage with conditions to leave money to the wife if she survived, the obligees could not be let in to prove their debts before the commissioners, because they were not payable at a certain future time, but depended upon contingencies.

Whereupon the judges in the Exchequer Chamber were unanimous for affirming the judgment upon the merits: but *Pengelly Ch. Baron* having some doubt upon the exception about *ex assensu suo*, the cause was adjourned, and the plaintiff applied to *B. R.* upon the 16 & 17 *Car.* 2. c. 8. to amend it: where *Jocelyn* argued very elaborately, that the record was not before them (3), and the fault not amendable if it was; notwithstanding which the judges did amend it (4), (though they seemed to think that it could not be a fatal objection) and upon amending the transcript also, it went back to the Exchequer Chamber, where the judgment was affirmed.

N. B. There had been a former action, where the bankruptcy was pleaded, but no petition of the creditors was set out, which the King's Bench held to be necessary, and for want of it the plea to be ill. But then exception being taken to the declaration, that it was not averred the heir did not pay the money, so that a cause of action did not appear, the plaintiff discontinued that suit upon payment of costs.

(2) Bottomree or *respondentia* Bonds are now proveable under the commission by 19 *Geo.* 2. c. 32. s. 2.

(3) *Vide Rutter v. Redstone,* ante 837.

(4) *Vide Richards qui tam v. Brown, Doug.* 113. 3 ed. and the note.

370

Trinity Term

4 Georgii 2 Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

William Lee, *Esq;*

Sir Philip Yorke, *Knt. Attorney General.*

Charles Talbot, *Esq; Solicitor General.*

Dominus Rex vers. Clendon.

INDICTMENT, setting forth that the defendant made an assault upon Sarah the wife of William Beatniff, and Elizabeth Cooper, and did them beat, wound, and evil intreat. After verdict *pro rege*, it was moved in arrest of judgment, that these were two distinct offences, and therefore could not be laid in the same indictment; and of that opinion was the court, and the judgment was arrested. *Strange pro def.* (1)

Cannot join assault on two people in the same indictment.
L. Raym. 1572.
1 Barn. B. R. 337.
2 Sess. Caf. p. 24. No. 28. S. C.

(1) This case is denied to be 984. *Vide 2 Hawk. P. C. ch. law in Rex v. Benfield, 2 Burr. 25. fol. 89. p. 342.*

Dominus Rex vers. Scott.

THE defendant was presented at sessions for not attending at the high constable's petty sessions, to give an account of his servant's wages; and being in *English*, contrary to 36 E. 3. c. 15. it was quashed. Presentment must be in Latin (1).

(1) But see 4 Geo. 2. c. 26. & 6 Geo. 2. c. 14. s. 5.

Baynham *vers.* Matthews.

Where there is a traverse the replication should conclude with an averment. *Fitzg.* 130. S. C.

CASE upon a promissory note; the defendant pleaded the statute of usury; to which the plaintiff replies, that the note was given for a just debt *absque hoc quod corrupte agreeatum fuit modo et forma*, and concludes to the country. *Demurrer inde, et pro causa*, that the replication should have been concluded with an averment. And *Fazakerley pro def.* argued that, the replication was ill, there being new matter disclosed; and though there be a negative and affirmative as to one particular fact, yet the plaintiff may conclude with an averment. *1 Jones* 327. *Lutw.* 1435.

Spelman contra cited *Co. Ent.* 305. *1 Inst.* 126. *Raym.* 98. That where there is a negative and affirmative, you must not conclude with an averment. *Et per curiam*, Generally speaking it is so (1), and if the plaintiff here would have been contented to have replied in the common form, *non corrupte agreeatum fuit modo et forma*, without a traverse, he would have been right in concluding to the country (2). But wherever you add a traverse, there must be an averment. *Rast.* 689. *Lib. Placit.* 156. (3).

Administrator discontinues without costs.

The plaintiff prayed leave to discontinue, and being an administrator it was granted without costs (4).

(1) *Vide* *Trapaud v. Mercer*, 2 *Burr.* 1022. S. P. *1542 Kely.* 710. S. C. *Bennet v. Coker*, 4 *Burr.* 1927. *Soy. Law of Costs* 95. *Hugh v. Lloyd*, *Burr. Prat. Exhib.* 156. S. P. But

(2) *Vide* *Robinson v. Raley*, 1 *Burr.* 316. *Boyce v. Whitaker*, *Doug.* 94. *Smith v. Dovers*, *ib.* 428. S. P. *Hedges v. Sandon*, 2 *Term Rep.* 439. and the cases there cited. this being discretionary in the court, they will not permit an executor or administrator to discontinue, except upon payment of costs where he has knowingly brought his action improperly. *Harris v. Jones*, 3 *Burr.* 1451. 1 *Black.* 451. S. C. in *B. R.* *Hall v. Norton*, *Barnes* 169. in *C. B.* *Coff. Pr.* in *C. B.* 79. S. C. *Et vide* *Howes v. Saunders*, 3 *Burr.* 1584. *Soy. Law of Costs* 87. S. C.

(3) But wherever the whole substance of the plea is put in issue by the replication, it may conclude to the country notwithstanding the traverse. *Vide* the authorities *supra*. n. (2).

(4) *Eccleston v. Clifson*, 2 *Keb.* 385. *Bird v. Smith*, 2 *Lavuard.*

Atkinson *vers.* Atkinson.

LEAVE was given to plead *non est factum*, and a discharge *Plea double* by a commission of bankruptcy (1).

(1) *Post. Philips v. Wood*, 1000. ruptcy denied. *Newman v. Chandler*, *Fort.* 336.
S. P. but *non assumpsit* and bank-

Dominus Rex *vers.* Charlesworth.

INFORMATION for forging a warrant of attorney to acknowledge satisfaction upon a judgment of *Easter term*. And after issue joined the record appearing to be of *Hilary term*, the information was amended without costs (the prosecutor having been admitted a *pauper*) and without giving the defendant leave to plead *de novo*; and *Hil. 10 Ann. Regina v. Simmonds* was cited, where the title of an act set forth in an information was amended. *Salk.* 47. 3 *Lev.* 347. (1)

Information amended.
1 Barn. B. R.
342. 344. S. C.

(1) *Rex v. Hughes*, cited in *Rex v. Ellam*, *Caf. temp. Hard.* 44. may be done by a single Judge at chambers. *Vide also Rex v. Holland*, 4 *Term Rep.* 458.
2 Barn. 446. *Rex v. Wilkes*, 4 *Term Rep.* 458.
Emr. 2527. 2532. S. P. and that it

Slater *vers.* Swann.

[872]

At Guildhall coram Raymond C. J.

ACTION upon the case, for that the plaintiff was possessed of an horse and cart, and the defendant so violently beat the horse, that the plaintiff was deprived of the use of his cart and horse for several days.

On Not guilty for beating a horse, defendant may justify in evidence.

The defendant pleaded Not guilty. And the Chief Justice allowed him to give in evidence a justification for beating the horse, *viz.* that the plaintiff put his cart before the defendant's door, and prevented a cart which the defendant had hired from coming to take his goods, and therefore he whipt the horse to remove the cart. And the Chief Justice said, this differed from *trespass vi et armis* for assaulting a man, where the assault is a cause of action; but here the assault on the horse is no cause of action, unless accompanied with a special damage. And therefore

Tradeſman may
remove a coach
from before his
door.

fore he left it to the jury, on the question whether defendant did any more than was neceſſary to remove the horſe and cart from his door, or beat the horſe immoderately. And they found for the defendant. He ſaid, if a hackney coach ſtands before a tradeſman's door, and hinders cuſtomers; he may lawfully take hold of the horſes and lead them away, and is not bound to take his remedy for damages. *Strange pro quer.*

Cole verſ. Buckland.

Practice.
3 Barn. B. R.
341. 345. S. C.

THE ſecond *ſcire facias* was returnable the firſt day of the term, and a week within term the bail moved to ſtay the proceedings, on the common terms of giving judgment in the *ſcire facias*, and taking four days to ſurrender after affirmance in the principal cauſe. But the court held they came too late, after their time to ſurrender was gone, and would not revive it again: all they would do was, to ſtay the ſuing out execution till after affirmance (1).

(1) *Vide Taſſwell v. Stone, 4 Burr. 2454.*

Dominus Rex verſ. Wych.

Quaker
3 Barn. B. R.
346. S. C.

IT was denied to read a quaker's affirmation on a motion for an information for a miſdemeanor (1).

(1) The affirmation of a Quaker appears to be either received or rejected by the court in a proceeding which is in its form criminal, upon the following principles. Where the form is merely criminal, but the immediate object of the proſecution is a civil recompence, the affirmation ſhall be received. *Vide Robins v. Sayward, ante 441.* and the caſes there cited. *Rex v. Turner, poſt. 1219.* But where it is in ſubſtance a criminal proſecution having for its immediate object the puniſhment of the individual againſt whom it is had, there it ſhall not be admitted. As in the preſent caſe, *Rex v. Bell, And.*

200. but no deciſion. *Rex v. Green, ante 527.* and the note. But in the caſes which come under this laſt claſs, a diſtinction ſeems to ariſe, where it is a proceeding inſtituted by, and where it is one had againſt a Quaker. In the former caſe his affirmation has been reſuſed, although the object of the application was his perſonal protection. But Lord Mansfield ſeems not to approve of theſe deciſions *Acheſon, v. Everly Cowp. 388.* and Lord Haldenſide expreſſed his doubts, and conſidered it as a queſtion proper to be ſent to the Judges. *Ex parte Gambleton, 2 Atk. 70.* On the contrary, where application is againſt a Quaker,

Quaker, his affirmation may be read in his own exculpation. *Vide* *Rex v. Shacklington*, 8 Geo. 2. *Hudson v. Jones*, 9 Geo. 2. *And* 201. n. *Rex v. Gardiner*, 2 Burr. 1117. But it cannot be read in exculpation of another, where the Quaker is not charged himself. *Id.*

Broome *vers.* Rice et al'. In C. B.

[873]

IN trespass, the defendant justifies under a distress for rent, and shews that he gave notice according to the act of Parliament, had the goods appraised by persons sworn before the headborough, and sold, and the surplus left in the hands of the constable; the plaintiff replied *de injuria sua propria absque tali causa*: and on the trial there was a verdict for the defendant. But upon motion the court set aside the verdict, and ordered judgment to be entered for the plaintiff, and a writ of inquiry of damages to issue. For by the defendant's own shewing the sale cannot be justified; it appearing there was a constable present, so that the headborough had no power to administer the oath. *Vide* *Cartberw* 370.

2 W. & M. c. 5. Defendant justifies under a distress for rent, and shews that the appraisers were sworn before the headborough, though a constable was present, the parties go to issue, which is found *pro def.*, the verdict shall be set aside and an inquiry awarded, for the (S. 28.) p. 524

sale cannot be justified. *Vide* 5 Com. Dig. Pleader, (S. 22.)

Coffin *vers.* Gunner.

THE defendant was convicted upon the black act, and ordered to be pardoned. on condition he transports himself, And the act working no forfeiture of goods or land, *Wheat* moved for leave to charge him in a civil action. And upon consideration, that it was not to hold him to bail, or restrain him from performing the condition of his pardon, the court gave leave to charge him with process, that the plaintiff might proceed to get execution (1).

9 Geo. 2. c. 22. Leave given to charge a felon convicted with process. L. Raym. 1572. 1 Barnard. B. R. 339. 341. 356. S. C.

(1) *Foxworthy's case*, 2 Ld. *Ramsay v. Macdonald*, 1 Black. Raym. 848. 2 Salk. 500. 7 30. 1 Wils. 217. *Fost.* 61. and *Mod.* 153. *contra* in the case of the opinion of *Foster J.* there. Attainder for felony. *See* *vide*

Stonehouse *vers.* Mullins.

THE plaintiff in Trinity term last brought an action of escape against the marshall, who imparled to *Michaelmas* term, and then pleaded a recaption on 20th of October. The

In escape, the recaption must be before action brought. 1 Barn. B. R. Escape, (C.) 643

354. S. C. 3 Com. Dig. plaintiff

plaintiff demurred. And judgment was given for the plaintiff, because to oust him of his action it should appear the recaption was before the action brought, and this appears to be long after. 3 Co. 44. 52. 1 Jon. 144. Cro. Jac. 657. 1 Roll. Abr. 808.

Debt lies on negligent escape.
Strange pro quer.
3 Com. Dig.
Escape, (B.) 639.

It was also held that debt lies by 1 R. 2. c. 12, as well where the escape is negligent, as where it is voluntary,

King *vers.* Wilson. At Guildhall.

Frauds and perjuries.

RAYMOND C. J. held, that a parol promise to pay the debt of another in consideration of forbearance, was void by the statute of Frauds and Perjuries (1).

(1) *Rothery v. Curry*, Tr 21 the distinction between the present case, and *Reed v. Nash*, 1 Geo. 2 C. B. Bull. L. N. P. 281. *Fish v. Hutchinson*, 2 Wilf. Wilf. 305. *Williams v. Leaper*, 94. In *Buchmyr v. Darnall*, 2 in C. B. 2 Wilf. 308. S. C. in *Ld. Raym.* 1087. S. P. and see *B. R.* 3 *Burr.* 1886.

[874]

Stonehouse *vers.* Ewen.

Elegit.
1 Barn. R. R.
356. S. C.
In Com. Dig.
Execution, (C.)
34.) 130.

PER curiam, If it be returned to an *elegit*, that there are no lands, the sheriff need not return an inquisition; for the use of that is only to deliver a moiety of the lands by, if there are any.

Dominus Rex *vers.* Inhabitantes de Minchinhampton.

Renting the pasture is no settlement.
2 S. H. Ca. p. 92.
No. 93. p. 163.
No. 132.
2 Bott by Const
245. pl. 185.
more full.

PER curiam, Renting a piece of pasture ground of 10l. per ann. is a settlement, but not renting the pasture of a piece of ground (1).

(1) This case is said to have been determined upon another point, viz. the want of an adjudication. *Burr.* S. C. 316. 2 *Scff. Cas.* 92. pl. 93. In *Rex v. Lockerty*, *Burr.* S. C. 318. *Wright J.* assented to the doctrine laid down here. But the opinion of *Buller J.* *Rex v. Old Stratford*, 1 *Term Rep.* 358. *Rex v. Suley*, 2 *Term Rep.* 451. and the reasoning of all the Judges in *Rex v. Tolpudde*, 4 *Term Rep.* 671. *Wright J.* 73. S. C. is contra.

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Dominus Rex vers. Earl.

THERE was a rule for the prosecutor of an information to pay costs for not going on to trial: the defendant died before they were paid. And it was held the executor could not have them; nor would he have been liable, if the testator had been ruled to pay them.

Costs not to be paid to an executor, by the prosecutor of a criminal information.

1 Barn. B. R. 335. 336.

Cowper vers. Osborne.

THE entry of judgment was *ideo conf* without *est*. And objected by *Reeve* to be error. *Sed per Strange*; it being abbreviated may pass for the present tense of the indicative mood of the passive verb, *consideratur*, it is considered; and the judgment was affirmed.

Consideratur is as well as *conf* *est*.

The Mayor of Poole vers. Bennet.

THE action was laid in the county of *Poole*, and for a duty claimed to be due to the corporation; and on my motion the venue was changed to *Hampshire* (a), it appearing manifestly there could be no fair trial in *Poole* (1).

Venue changed.

1 Barn. B. R. 283. Case with same name but of a different term, and the motion said to have been refused.

(a) Dorsetshire, quare.

(1) *Vide Mayor and Commonalty Mylock v. Saladine*, 3 Burr. 1564. of *Bristol v. Proffor*, 1 Wils. 298. *Rex v. Amery*, 1 Term Rep. 363.

Child et al' vers. Hardyman.

At Guildhall coram Raymond C. J.

[875]

ACTION for linen sold to the defendant's wife. Upon *non assumpsit*, the delivery was proved. And the defendant proved that she had lived in a very lewd manner; one Mr. *Nott* frequently coming to her at her husband's house, and they were locked up together in a bed chamber; and other indecencies passed between them. And it was also proved, that she several times went to the house of this *Nott*, a gentleman in *Wiltshire*, who lived within three miles of the defendant's house. It did not appear farther than that he disliked her going and staying at Mr. *Nott's*. But under these circumstances they continued to live together (1). Afterwards on the 18th of October 1726,

Wife having lived in a lewd manner while with her husband, leaves him, and afterwards sends to him to receive her, or allow her a maintenance; he tells her that she should live in his garret, and refuses her a maintenance. He is not answerable for her debts.

(1) That this is immaterial *vide Robison v. Gosnold*, 1 Salk. 119. 1 Mod. 171. S. C.

she

she went away from him, and went to *Marlborough*, where she resided for some time. But after the leaving her husband's house it did not appear that she ever saw Mr. *Nott*, or lived in a lewd manner. After some time she sent *Lucas* an attorney to her husband, to desire that he would receive her again; the husband told him, that if she came again she should never sit at the upper end of his table, nor have the government of the children, but should live in a garret. Then *Lucas* proposed to him, to make her an allowance, and proposed about 80*l.* or 100*l.* per annum, he being worth about 5 or 600*l.* per annum. But that was not complied with; and afterwards she came to *London*, and bought the linen to the amount of 53*l.*

Chief Justice *Raymond* was of opinion, that the plaintiff should be called. And accordingly he was nonsuited. He held, if a woman elopes from her husband, though she does not go away with an adulterer, or in an adulterous manner; the tradesman trusts her at his peril, and the husband is not bound. And this had been so adjudged in two or three cases (2). Indeed if he refuse to receive her again, from that time it may be an answer to the elopement (3). In this case he does not absolutely refuse to receive her again (4): but that she should neither sit at his table, nor have any government of the children, but should be kept in a garret; and she deserved no better usage. And the plaintiff was nonsuit.

(2) *Etherington v. Parrot*, 1 *Ld. Raym.* 1006. *Longworth v. Hackmore*, 1 *Salk.* 118. 12 *Mod.* 244. 1 *Ld. Raym.* 444. S. C. S. P.

(3) *Manby v. Scott*, S. P. 1 *Bac. Abr. Baron and Feme.* (H.) 1 *Sid.* 109. 1 *Mod.* 124. 1 *Lev.*

4. 1 *Keb.* 69. 80. 87. 206. 337. 361. 383. 429. 441. 482. S. C. See more upon the subject of the husband's liability to debts contracted by the wife. *Bolton v. Prentice*, post. 1214.

(4) *James v. Warren*, *Holt* 104.

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Michaelmas Term

4 Georgii 2. Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

William Lee, *Esq;*

Sir Philip Yorke, *Knt. Attorney General.*

Charles Talbot, *Esq; Solicitor General.*

} *Justices.*

Palmer vers. Wadbrooke.

IN trespasss, assault and battery, the defendant moved for leave to plead double, *viz.* Not guilty, and a justification in defence of his master's barge. Which was denied as being contradictory (1).

Not guilty, and a justification not allowed to be pleaded.
1 Barn. B. R. 368. S. C.

(1) *Fisher's case, Fort. 335. R. acc.*

Berchere et al' vers. Colson.

THE defendant prevailed with *Collins* and *Bevan* to become bail for him to the sheriff in 300*l.* at the return of the writ they went before a Judge in order to put in bail above. And the defendant himself appearing, and insisting that no bail should be taken, the Judge refused to do any thing in the matter. Whereupon I moved the court, that to prevent so palpable fraud, the bail might be permitted to perform the condition of their bond, by putting in bail. And leave being given so to do, the bail was put in before a Judge, and the next day the bail took up the defendant, and surrendered him in discharge of themselves.

Bail may be put in above without the defendant's consent.
Tidd's Praes. K. B. 126:

Andrews *vers.* Dingley.

Quashing writs
is not *ex debito*
justitie.

Barnard. K. B.
362, 369. S. C.
but somewhat
different.

STRANGE moved to quash a special *capias* that was *teste* 17 June last, the cause of action appearing on the face of it to arise 21 September after. But the court said, quashing was not *ex debito justitie*, and therefore they would give the plaintiff an opportunity to set it right if he could, by filing a bill as of this term.

Riston *vers.* Francis, Bail of Nash.

Practice.
1 Barn. B. R.
373. S. C.

AFTER judgment on *scire facias* against bail, Agar moved to stay execution, the principal having brought error, and the bail undertaking to pay the condemnation money and the costs on the *scire facias* in four days after affirmance: but in this case there being no bail on the writ of error, the court made the bail undertake also to pay the costs on the writ of error, in case the judgment was affirmed: and said, it was a favour they were asking, and they would make them submit to equitable terms.

Worley *vers.* Glover.

12 Geo. 1. c. 29.
Practice on serv-
ing copies of
process.
1 Barn. B. R.
374. S. C.

PER curiam, On the late act 12 Geo. 1. c. 29. which requires the process to be served, it is not necessary to shew the party the original writ, as you do on service of rules. The act only requires him to be served with a copy, which is the same as if it had said *deliver a copy*. *Strange pro def.* (1)

(1) *Boswell v. Roberts*, S. P. in *C. B. Barnes* 422.

Dominus Rex *vers.* Elford.

Certiorari.
1 Sess. Ca. 323.
No. 256. S. C.

AFTER a *mandamus* was taken out under seal of the court, the defendant (being the country attorney) found a fault in it, and altered it before he delivered it to the party to whom it was directed. And for this an attachment was granted. And upon his submission and paying costs he was discharged. After this he was indicted before the Judges of assize at Exon for a forgery. And upon these circumstances he moved for a *certiorari*, but the prosecutor not consenting, the court refused to grant it (1).

(1) *Rex v. Bestland*, post. 1202. *Regina v. Knatchbull*, 1 Salk. 150.
Vide Rex v. Wells, ante 549.

Winter *vers.* Slow.

ON a motion to stay the plaintiff's proceedings as a *pauper*, till he paid costs in a former action, wherein he was nonsuited: it appeared that the nonsuit was upon a slip of the attorney's (1), and not upon the merits of the cause; which the defendant might have gone into notwithstanding, if he would. The court thought this was not vexatious, and therefore refused proceedings.

Pauper.
1 Barn. B. R.
375. MSS. S. C.

(1) The slip was, that the action being trover, the only demand and refusal to prove the conversion was made after the writ was sued out. MSS. and which last report the motion was to dispauper the plaintiff upon this ground; and that that is the proper method of proceeding *vide Neaks v. Watts, ante 420. Taylor v. Lowe, post. 983.*

Mallory *vers.* Jennings.

UPON debate it was held, that the want of a writ of inquiry is aided by the statute of jeofails; though it was insisted to be such a fault as could not happen in the case of a verdict.

Want of writ of inquiry is aided.
(1)
1 Barnard. B. R.
376.
Fitzg. 162. S. C.
MSS. S. C.

(1) *Hes v. Pitt, 2 Ld. Raym. 1397. S. P.*

Dupleffis *vers.* Chalk.

DEBT for rent laid in *London* on a parol demise of lands in *Kent*; and the court refused to change the *venue*, saying they never do it in debt.

Venus.
Fitz. 166.
1 Barnard. B. R.
379. S. C.
Vide 1 Crompt.
Prac. Of the
venue 113.

Between the Parishes of Hanmer in com' Flint and Ellesmere in com' Salop.

UPON a special order of sessions, the case stated was, that *Randal Fidian* being unmarried, and having no child, was hired into *Hanmer* for a year, and served the same; and afterwards in 1718, he being still unmarried, and having no child, was hired into *Ellesmere* in *Salop*, to serve from *Lady-day* to *Christmas* following, (which he did) and was then hired again for a year by the same master, and served to the end of *May*.

Connected service for a year, although part of it not under the hiring for a year, gives a settlement.
1 Barn. B. R.
378.
2 Sess. Ca. p.
166. No. 133.

And the sessions adjudged it no settlement, and sent him to *Hanmer*.

L. Raym. 1512.
Fort. Rep. 316.

Strange moved to quash the order, there being in the whole a service for a year in *Ellesmere*, and that is enough to satisfy the statute, which requires both a hiring and service for a year. And cited the cases of *Overton v. Steventon*, Hil. 10 W. 3. and *Rex v. Inhabitantes de Brightwell in com' Berks*, in both which it is held, that the service for a year need not be of the same identical year for which the hiring for a year was. And upon the authority of these cases the court held it a settlement in *Ellesmere*, and quashed the order of sessions, that adjudged it otherwise (1).

(1) *Rex v. Southmoulton*, 1 *Ld. Raym.* 426. *Brightwell v. Westbally*, 2 *Bott by Const.* 417. pl. 387. *Rex v. Aynhoe*, *ib.* 420. pl. 389. *Rex v. Fifehead Magdalen*, *Burr. S. C.* 116. *Rex v. Under Barrow and Bradley Field*, *ib.* 545. *Rex v. Bagworth*, *Cald.* 182. *Rex v. Grendon Underwood*, *ib.* 359. S. P. From these cases it appears to be immaterial as to gaining a settlement what is the NUMBER or particular DURATION of each of these contracts under which the year's service is performed, that is to be coupled with service under the yearly hiring, provided they are connected. It seems equally immaterial whether the NATURE of the services performed under the several contracts are different or not, provided they are such as that a contract to perform each of them for a year, and service under it would be sufficient to give a settlement. *Rex v. Winton*, *Burr. S. C.* 280. Where it was held that service under a weekly hiring to burl

cloth could not be coupled with service under a yearly hiring, so as to confer a settlement, seems at first view to contradict this opinion. But the ground of that decision was, that the contracts and not that the services were of a different nature, the weekly hirings being such, as that service under a similar one would not confer a settlement, though it had been extended in its duration to a year. Mr. J. *Foster* lays particular stress upon the pauper's not being "in her master's service either at night or on Sundays." There was therefore a special exemption in the contract, which not being created by general law or by local custom, but by the agreement of the parties, would prevent a settlement from attaching to a year's service, under a similar contract, for a year. As to which point *vide Rex v. Macclesfield*, *Burr. S. C.* 458. *Rex v. Buckland Denham*, *ib.* 694. *Rex v. Kingswinford*, 4 *Term Rep.* 219. *Rex v. North Nibley*, 5 *Term Rep.* 21.

Robinson et al' Creditors of Dr. Tonge *vers.* Tonge et al'.
In Caus'.

UPON debate it was held, that an advowson in fee was real assets in the hands of the heir for payment of debts. 1 Jon. 24. And the decree was affirmed in the House of Lords (1).

Advowson is af-
sets.
3 Will. Rep.
398, 401.
2 Eq. Ab. 259.
c. 16, 454.
c. 14.
3 Bro. Par. Ca.
556. S. C.

(1) *Vide* 1 Com. Dig. Affets (A.) 562. 2 Com. Dig. Chancery (2 G. 1.) 363.

Dr. Gooche *vers.* The Bishop of London.

THE bishop libelled in the spiritual court, suggesting that Dr. Gooche, as arch-deacon of *Essex*, *tenetur solvere* 10 l. due to the bishop as a prestation, for the exercise of his exterior jurisdiction.

Suit may be in the spiritual court for a prestation, where the title made to it in the libel is general, altho' the plea put in is, that there was no prescription.
1 Barn. B. R. 391. S. C.
Vide 3 Barn. Eccl. Law. 79.

Reeve moved for a prohibition, alleging that they had pleaded there was no prescription; and then that being denied, a prohibition ought to go for defect of trial.

E contra it was argued by *Henchman et al'*, that the libel being general, it must not be taken that they go upon a prescription; but it is to be considered in the same light as the common case of a pension, which is sueable for in the spiritual court: and the nature of the demand shews it must have its original from a composition, it being a recompence for the arch-deacon's being allowed to exercise a jurisdiction, which originally did belong to the ordinary. 2 Cro. 666. Salk. 58. Cro. Eliz. 675. 2 Inst. 491.

Et per curiam, They may certainly intitle themselves *ab antiquo*, without laying a prescription. And as they have only laid it in general, there is no ground for us to interpose, till it appears by the proceedings, that a prescriptive right will come in question: if they join issue on the plea, it will then be proper to apply; but at present there ought to be no prohibition.

Ante 422.

Dominus Rex *vers.* Wildman.

Mandamus to the clerk of a company to deliver books to the company (1).

[880]

Mandamus must be made out according to the rule.

A *Mandamus* was granted to *Wildman* on my motion, requiring him to deliver to the company of blacksmiths all books, papers, &c. which he had in his custody by virtue of being their clerk, from which office he had been removed.

The officer took the rule to deliver them to the new clerk; but the *mandamus* was made out right, as I moved for it; however it varying from the rule, the writ was superseded (2), and I afterwards moved and obtained a new one.

- (1) "A *mandamus* was granted 1 *Sid.* 31. *Rex v. Ingram*, 1 *Black.*
 "for the clerk of a turnpike road to 50. *Rex v. Chapman*, 1 *Wils.* 305.
 "deliver the books over. *Rex v. Vide* also case of *Borough of Calne*,
 "Robinson 1757, *MSS.* *Ms. Dun-* *post.* 948.
 "ning." *MSS.* see also *Sheriff and* (2) *Vid. Rex v. Major de King-*
Town Clerk of Nottingham's case, *flon, supra* 578.

Buller *vers.* Lusitano de Pina.

Where error abates by the act of the plaintiff execution shall go.
 1 *Barn. B. R.*
 403. *S. C.*

A Writ of error brought by a *feme* sole abated by her marriage, and then she and her husband bring a second; and the court gave leave to take out execution, it being a delay occasioned by the act of the plaintiff in error (1). 1 *Mod.* 285. 1 *Vent.* 100.

- (1) *Jenkins v. Bates, post.* 1015. *S. P.* *Vide* 5 *Com. Dig.* *Pleader*, (3 *B.* 12.) 706.

Dominus Rex *vers.* Solomon Nathan.

Bankrupt discharged for faults in the commitment.

1 *Sess. Ca. p.*
 322. No. 264.
 1 *Barn. B. R.*
 398. *S. C.*

THE defendant was committed by the commissioners of bankrupt, who in their warrant recite that he had been examined before them upon his oath, upon which examination he had notoriously prevaricated; they therefore commit without bail or mainprize, until he shall make a full and true disclosure and discovery of his estate and effects (1), or be otherwise delivered by due course of law.

Upon a *habeas corpus* it was moved that the defendant might be discharged. 1. Because the statute 1 *Jac.* 1. c. 15. requires

- (1) *Thomas Miller's case*, 2 *Black.* 880, 1141.

there

there should be interrogatories exhibited for his examination, that so he may have time to consider of his answer, and it can then appear to the court whether he is bound to answer. Perhaps this prevarication might be in a matter they had no power to enquire into. 2. *Prevaricated* is too loose an expression: he might prevaricate, and yet give a full answer at last. 3. *Or be otherwise discharged* is wrong. *Salk.* 351 (a). 348.

(a) 2 Ld. Raym.
351. S. C.

Et per curiam. Interrogatories are a term known in law, and import that the questions are put in writing. And *Holt* held the bankrupt ought to have a copy, and time to consider of his answer. It is very dangerous to let people depart from the words of the act, where these special authorities are given. And this commitment not pursuing the words, the prisoner must be discharged. *Strange pro defendente.*

John Giles's Case.

MR. Reeve moved for a *mandamus* to the justices of the city of Worcester, to grant a licence to *Giles*, to keep an ale-house: insisting that it being within a city, the * 2 Geo. 2. c. 28. did not extend to it.

Strange contra insisted, that it was discretionary in the justices; and cited *Salk.* 45. that no appeal lies from the denial of a licence (1) and if the owner be committed, the want of a licence can only come in question, and not the reason why it was denied.

Et per curiam, There never was an instance of such a *mandamus*, and therefore we will not grant it.

Mandamus lies not to grant a licence to keep an ale-house.
1 Barn. B. R.
402. S. C.
Cited And. 180.
* 2 G. 2. c. 28.
sect. 11. repealed by 26 G. 2. c. 31. sect. 4.
n. to 2d ed.

[881]

(1) "It was said by Mr. Nares " *Giles had signed a petition to erect*
" in the case of *Rex v. Young and* " *a workhouse, and though the re-*
" *Pitts, Esq. B. R. 20th April* " *fusal was so ill founded, yet the*
" 1758, that the sole reason why " *mandamus was denied. MSS. See*
" the justices of peace refused the also the report of that case. 1
" licence in this case was because *Burr.* 556.

Joshua Cornwall's Case.

HE was indicted with another person for burglary. And upon the evidence it appeared that he was a servant in the house where the robbery was committed, and in the night-time opened the street door, and let in the other prisoner, and shewed him the side-board, from whence the other prisoner took the plate: then the defendant opened the door and let him out; but the defendant did not go out with him, but went to bed.

Upon the trial before Lord Chief Justice *Raymond*, Justice *Denton* and Baron *Comyns* at the *Old-Bailey*, it was doubted, whether this was burglary in the servant, he not going out with the other: and it being laid down in *H. P. C.* 81, *Dalt.* 317. that

Servant lets in a thief, it is burglary.
1 H. H. P. C.
553.
1 Hawk. c. 38.
f. 9. p. 162. and
1 Str. 10. S. T.
433. in note.

it is not burglary in the servant; the Judges ordered it to be found specially. And afterwards at a meeting of all the Judges at *Serjeants'-Inn*, they were all of opinion that it was burglary in both and not to be distinguished from the case that had been often ruled and allowed in the same page in *Hale*, that if one watches at the street end while the others go in, it is burglary in all: and upon report of this opinion the next sessions the defendant was executed.

[882]

Mary Freeman alias Talbot's Case.

The justices have power to commit to hard labour idle and disorderly persons (1).

SHE was committed by several Justices of the peace, being taken on a general privy search, and charged on oath to be a loose, idle and disorderly person; and the commitment required her to be kept to hard labour till the first day of the next general quarter-sessions: and upon consideration of all the statutes relating to this matter, which are 39 *El. c. 4.* 1 *Jac. 1. c. 7.* 7 *Jac. 1. c. 4.* 13 & 14 *Car. 2. c. 12. § 16.* 11 & 12 *W. 3. c. 18.* 1 *Ann. c. 13.* 12 *Ann. c. 23.* the commitment was held to be good, and the prisoner remanded. *Strange pro deficiente.*

(1) *Vide* 17 *Geo. 2. c. 5. § 4.* grants, 4 *Com. Dig.* Justices of the Peace (B. 76.) *et seq.* 636.

Fuller vers. Jocelyn.

Judgment may be entered on a warrant of attorney after the death of the party (1).
Cal. Temp. Hardw. 158.
1 Barn. B. R. 357, 358, 404. S. C.

LADY *Twisden* (the defendant's testatrix) 9 February 1719 gave a warrant of attorney to confess a judgment. 18 April 1730 she died, and the judgment was signed 22d of April, as a general judgment of *Easter* term, which began the 15th. And upon motion to set it aside, it was insisted, that by the death of the party the warrant was countermanded. 1 *Vent. 310.* *Salk. 399.* *Co. Litt. 52. b.* For it is considered as given only in case of the party, to excuse her personal appearance in court, and the attorney cannot do more for her than she could for herself. And this is by relation to divest a right legally vested in the executor, who in confidence of the goods may have advanced money out of his own estate.

(1) *Chancy v. Needham, post. Wms. 398.* *Sawille v. Wilshire, 1081.* *Robinson v. Tenge, 3 P. Barnes 271. S. P.*

But the court said, that the case of *Oates v. Woodward*, Salk. 87. 2 Mod. Caf. 93 (a). was not to be got over; and that it being the course of the court to enter the judgments as of the first day of the term, they could not alter it on consideration of the circumstances that attend a particular case: besides this seems to be established by the statute of frauds, which provides for purchasers, but has given no remedy for this.

(a) Rep. also,
2 L. Raym. 766,
249.
3 Salk. 216.
Holt 401.

Dominus Rex vers. Johannem Huggins, Arm.

THE defendant stood indicted before the justices of *oyer* and *terminer* at the *Old-Bailey*, and the indictment set forth, that *John Huggins* 1 October 12 Geo. 1. and long before, and until 1 January following, was warden of the *Fleet*, and had the care and custody of the prisoners committed thither. That *James Barnes* was his servant, employed by him in taking care of the prisoners. That *Barnes* being a person of a cruel nature and disposition, did 1 November 12 Geo. 1. make an assault upon *Edward Arne* then a prisoner in the *Fleet*, and feloniously took him against his will, and carried him to a new-built room in the prison, where he kept him six weeks without fire, chamber-pot or close-stool, the walls being damp and unwholesome, and the room built over the common shore. That at the time of such imprisonment *Barnes* and *Huggins* knew the room to be as before described. That *Arne* by reason of his imprisonment in the said room sickened, and by dures thereof died; and that *Huggins* was aiding and abetting *Barnes* in committing the said felony and murder.

If a gaoler confines his prisoner against his will in an unwholesome room without allowing him the necessaries of a chamber-pot, &c. whereby he contracts a distemper by which he dies, this is murder by dures in the party doing it. But if the verdict finds that the principal knew the condition of the room for 15 days before the death of the deceased, and that he was within that time once present "and saw the deceased under the dures of the said imprisonment and turned away," sufficient facts are not found to amount to murder. In criminal cases the principal is not answerable for the act of his deputy. The accidental presence of the principal does not revoke the power of the deputy, *de novo* can be 358, 396. with 9 St. Tr. 111.

The defendant *Huggins* only was taken, and having pleaded Not guilty, the jury find this special verdict.

That Queen *Anne* by letters patent under the great seal dated 22 July 12th of her reign, constituted *Huggins* warden of the *Fleet* during his life, to be executed by himself or his sufficient Deputy or deputies. That from the date of the letters patent until 1 January 12 Geo. 1. the defendant was warden, and *Thomas Gibbon* all the said time his deputy, and acted as such. That *James Barnes* was the servant of *Gibbon*, and acted in the care of the prisoners, and particularly of *Edward Arne*. That *Barnes* 1 September 12 Geo. 1. assaulted *Arne*, and feloniously put into a room (which is found to be as described in the indictment) and kept him there forty-four days without fire, chamber-pot, or

must also have an intention of executing the office. *Quare*, whether a venire awarded for uncertainty in a verdict in a capital case. L. Raym. 1574. 1 Barn. B. R. arguments of the counsel at *Serjeants'-Inn*. Fitzg. 177. and with the evidence.

close-stool,

close-stool, or such like utensil. That *Barnes* knew the room to be situate as in the indictment, and that it was unwholesome; and that for fifteen days at least before the death of *Arne*, *Huggins* knew the condition of the room (1), but whether he knew it before, *penitus ignorant*. That by duress of the imprisonment *Arne* 10 September became sick, and languished till 20 October following, upon which day he died by duress of the said imprisonment in the said room. That fifteen days at least before his death *Huggins* was once present at the said prison, and saw *Arne* under duress of the said imprisonment, and turned away, and at the same time he so turned away *Barnes* shut the door, and *Arne* continued in the room till he died. That during the time that *Gibbon* was deputy, *Huggins* sometimes acted as warden. But whether he be guilty of the murder of *Edward Arne* is the doubt of the jury; on which they pray the advice of the court; *et si pro Rege, pro Rege; et si pro defendente, pro defendente*.

[384]

This verdict was removed at the prayer of Mr. Attorney into B. R. and there argued by Mr. *Willes* and Serjeant *Eyre*; after which it was argued at *Serjeants-Inn-hall* in *Chancery-lane* before all the Judges, by Serjeant *Chefhyre*, Mr. Attorney, Mr. Solicitor, and Mr. *Willes*, for the King; and by Serjeant *Darnall*, Serjeant *Eyre*, Serjeant *Hawkins*, Mr. *Peere Williams*, Mr. *Strange* and Mr. *Foster*, for the prisoner. But as every thing insisted on by either side is taken notice of in the opinion delivered by the Chief Justice, it will not be necessary to state the arguments of counsel.

Raymond Chief Justice, after stating the heads of the special verdict, went on as follows. The general question in this case is, whether upon the facts found in the verdict, the prisoner at the bar is guilty of the murder of *Edward Arne*.

For that purpose it will be necessary to consider these two things: 1. What offence it is in *James Barnes*; and, 2. Whether the prisoner is guilty in the same degree.

1 H. H. P. C.
432.
1 Hawk. P. C.
c. 31. sect. 4.
sec. 118.

And as to the first point we are all of opinion, that if *Barnes* was now before the court, and the facts as found in this verdict were found against him; he would undoubtedly be guilty of murder. It is certain, there is no particular way of killing another, that is

(1) According to the report in *Ld. Raym.* 1577. the verdict was, "newly built, and that the walls of that room were made of bricks and mortar and then were damp."

necessary

necessary to constitute a murder; but the committing of murder is as various as the several ways of putting an end to life. In the case of a prisoner there is no occasion for an actual stroke: the restraining him by force, and killing him by ill usage, is enough to constitute this offence. All the authors who speak of this species of murder describe it by a general expression, *per dure garde de ses gardens*. The duty of a gaoler is not to punish, but confine the party, for the single purpose his of being forth-coming to answer a legal charge or demand. *Fleta* 38. In this case *Barnes* has certainly exceeded his duty; he has been guilty of a breach of that trust, which the law has reposed in him, and is answerable for all the consequences of it.

3 Inst. 35, 97.
Briton. cap. 11.
c. 8.
Crompt. 90.
Bract. 105.

Another consideration to make it murder is, that it is a deliberate act, of long continuance and of great cruelty. It is likewise accompanied with force, against the consent of the party. On all which accounts the law implies malice. Had he therefore been before the court, there would have been no difficulty in adjudging it murder with regard to him (2).

Having thus determined what offence it would be in *Barnes*, let us now consider how it stands with regard to the prisoner at the bar. And tho' the indictment has charged him equally with the other, yet we think the verdict has made a wide difference between them. The indictment charges *Barnes* to be his servant, but the verdict finds he was the servant of *Gibbon*. The whole charge in the verdict against the prisoner is, that for fifteen days before *Arne's* death, he knew what sort of room he was in: that he once saw him under the duress of imprisonment that *Barnes* had put him: and that during the time *Gibbon* was deputy, *Huggins* sometimes acted as warden. But notwithstanding these circumstances which are found against the prisoner at the bar, we are all of opinion, he is not guilty of murder.

[885]

It is a point not to be disputed, but that in criminal cases the principal is not answerable for the act of the deputy, as he is in civil cases: they must each answer for their own acts, and stand or fall by their own behaviour. All the authors that treat of criminal proceedings, proceed on the foundation of this distinction; that to affect the superior by the act of the deputy, there must be the command of the superior, which is not found in this case.

The duress in this case consisted in the first taking him against his consent, and putting him in that room, and the keeping him

(2) *Castell v. Bambridge*, ante 856. *Fost. Cr. Law*. 322.

there

there so long without necessaries, which was the occasion of his death. Now none of these circumstances are found as against the prisoner. The jury does not say he directed his being put into the room, that he knew how long he had been there, that he was without the necessaries in the indictment, or was ever kept there after the time the prisoner saw him, which was fifteen days before his death. And as these are circumstances found against *Barnes*, and not against *Huggins*; and as in these cases the court is never to intend any thing, but must found their judgment on the facts as stated in the special verdict, and on them only; there can be no colour to think one equally guilty with the other. The only circumstance relied upon to supply all this is, the prisoner's being once at the prison where he saw the deceased under the duress, and turned away. But surely the bare being present can never amount to an aiding and abetting. He saw him there, it is true; but does that infer he knew how it was occasioned, or consented to the continuance of it? It is very material in this case, that the duress by which this unfortunate man came to his end, could not be known by a bare looking in upon him: he could not know he was there against his consent, he could not by seeing him know the length of his confinement, or how long he had been without the decent necessaries of life: and it is likewise material, that no application is found to have been made to the defendant, which perhaps might have altered the case.

[886]

These circumstances, taking them all together, are a very slender evidence of a consent in the prisoner to the duress; tho' this I must say, that were they ever so strong an evidence of consent, they will not be sufficient for us to ground a judgment upon: we are to determine upon facts, and not on evidence of facts; so is *Kelyng* 78, 111. where it is found, that *Plummer* discharged the fuzee, but not that he discharged it *against* the King's officers; and the court could not take it that he did. It would be the most dangerous thing in the world, if we should once give into the doctrine of inferring facts from evidence; which is the proper business of a jury, and not of the court.

But it is objected, that though the prisoner had made a deputy, he had still the inspection of the gaol; and for the time he was there, the power of the deputy ceased. To this I answer, that there is no case in law which proves, that the accidental presence of the principal amounts to a revocation; and in reason it ought to be construed such a coming, as shews he intended to take upon himself the execution of the office. If a disseisor comes to dine with the disseisor, that will not amount to an entry.

It is likewise insisted on, that in many cases a person who is absent when the murder is committed, may nevertheless be an aider and abetter; and the cases were put of laying poison, putting a child in a hogstye, covering it with leaves, or leaving a sick man in the cold, by which he dies, which are all to be met with in *Keyling*. Now as to these cases I must observe, that in every one of them the person absent did the act which was the occasion of death; whereas here the act is found to have been done by another.

Palm. 547.
Poph. 13.
Ow. 98.
1 H. H. P. C.
431.

It was further observed upon this head of absence, that in *Staunf.* 17. *Crompt.* 24. *b.* the case is ruled to be murder, of letting a mischievous beast go abroad, which happens to kill a man. But surely that is laid down too general in those books: and it would be very hard, if a man takes a reasonable care to keep up the beast; that he should be answerable, if the beast should break out without his knowledge or consent.

There is but one thing more that was pressed by the King's counsel, *viz.* that since it was determined in *Oneby's* case, that it is not necessary for the jury to find malice, why is it more necessary to find the prisoner's consent? To this I answer, that malice is matter of law arising from a legal construction of the act and from the act of the party the law has always construed whether there was malice express or implied: but consent is an act of the mind: a sudden killing is construed to be malicious, though there is no time for any consent. These are the reasons which induce us to determine that upon this verdict the prisoner at the bar, is Not guilty of the murder of *Edward Arne*. [887]

Ante 766.

But then upon the argument of this cause a difficulty arose, what the court should do in this case, supposing the verdict to be too uncertain to found any judgment upon. It will therefore be necessary further to consider: 1. Whether this is an uncertain verdict; and 2. Supposing it is, whether we are to discharge the prisoner, or award a *venire facias de novo*.

Now as to the last point, it is observable, that no instance could be produced where, in a criminal case (3) it was never done for a fault in the verdict itself. *Arundel's* case in 6 Co. was for a fault in the jury process, and in the case cited of *Hil. 8 H. 7.*

(3) The other reports have it on a criminal information for a libel. *Vide Rex v. Woodfull*, 5 Burr. 2661.

(a) Rep. also
1 L. Raym. 138.
Holt 48.

Ro. 3. there was no verdict, the Judge discharged the jury, and would not take their verdict, because it was put into their hands in writing as they stood at the bar. And in the case of Mr. Keate, 5 Mod. 287. Skinner 666 (a). though the verdict was so incertain, that it was impracticable to determine either way, for want of finding who struck first; yet Holt C. J. was so averse to a *venire facias de novo*, that he himself took an exception, that quashed the indictment, in order to put it into a proper way of being tried over again.

But whatever may be the determination of the court, when that point comes properly before us, it is unnecessary for us now to consider (4), because as to the other point we are all of opinion, that this verdict is not incertain.

There is no incertainty as to the facts that are found: the only fault is, that there are not such facts found as will amount to murder. The consequence of which is, that the defendant is Not guilty of murder; and it would be endless to send it back to a jury, till they find facts enough to make it murder; besides its being contrary to law, in exposing a man to a second hazard of his life.

It would have been a circumstance very material in the case of *Plummer, Kelyng* 111. to have found, that the fuzee was discharged against the King's officers; but the jury were silent as to that, and the court said they could not take the fact to be so, upon bare evidence of the fact; and proceeded to give judgment, as if the fuzee had not been discharged against the King's officers, without sending it back to the jury to find it positively one way or the other.

[888] So in the case of *Messenger et al* (*Kelyng* 79.) who were indicted for high treason in assembling and pulling down bawdy-houses. The verdict was silent as to *Green* and *Bedell*, whether they were aiding and assisting; and this (says *Kelyng*) being a matter of fact, which ought to be expressly found by the jury, and not be left to the court upon any colourable implication from their being present; they two were discharged, without sending it back to the jury for their further opinion as to the fact.

(4) According to the report in *Barnard*. 398. *Ld. Raymond* is made to say, "that all the Judges had delivered their several thoughts to be, that if the verdict had been uncertain a

"*venire de novo* would not have been laid." But all the other reports concur with the present, that they gave no opinion upon the point.

In *Kelyng* 66. on a special verdict it was found, that *Thompson* and his wife were fighting, and *Darves* endeavouring to part them was killed by *Thompson*: and it not being found, that *Thompson* knew *Darves* intended only to part them, it was held manslaughter, without sending it back to the jury to be certified of his knowledge.

These are cases directly in point as to this head; and I must observe that *Plummer's* case was after the case of *Keate*, wherein *Holt* Chief Justice had this point under his consideration.

This verdict therefore being sufficient to found a judgment upon, our judgment is, that the prisoner is Not guilty, and therefore he must be discharged.

Hilary Term

4 Georgii 2 Regis. In B. R.

Robert Lord Raymond, *Lord Chief Justice*.

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

William Lee, *Esq;*

} *Justices.*

Sir Philip Yorke, *Knt. Attorney General.*

Charles Talbot, *Esq; Solicitor General.*

Da Costa vers. Carteret et al'.

Not guilty and
the statute of li-
mitations plead-
able.

Fitzg. 189.

1 Barn. B. R.

407, 412. S. C.

Ante 678.

THE Common Pleas having last term determined, that *non assumpsit*, and *non assumpsit infra sex annos* should not be pleaded, because the latter puts all in issue, and does not imply a promise without the six years; it came now to be solemnly debated in this court, *Strange* having moved for leave to plead Not guilty and the statute of limitations. And the court granted it for this reason, because thereby the defendant secured to himself a trial upon the merits in all events, whereas if he was to rest only on the *non assumpsit infra sex annos*, it might come to a demurrer, or the issue of *nul tiel record* (1).

(1) *Vide Cox v. Rolt*, 2 *Wils.* 253.

Willams *vers.* Ogle.

UPON the issue of *nul tiel record*, one was *Segrave* and the other *Seagrave*, and the court held it no variance, *quia idem sonans*. *Qu. tamen*, where the party has something else to go by than the sound.

Variance.
Vide ante 201,
231, 787.
Doug. 194.
6 Com. Dig.
Record.
(C.) (D.) 173.

Leapidge et al' *vers.* Pongillionne.

[890]

IN debt *sur emisset* for goods sold, the court refused to let the defendant bring money into court, saying they never did in debt (1). *Strange pro quer*?

No bringing
money into court
in debt.
1 Barn. B. R.
420. S. C.

(1) In the report in *Barnard*. the court granted a rule to shew cause; and in debt wherever the sum that the plaintiff can take out execution for is capable of being ascertained by mere com-

putation, money may be paid into court as in debt for rent, &c. *Vide Hallet v. East India Company*, 2 Burr. 1120. and the cases collected, 1 *Crompt. Pract.* 150. *Imp. Pract. K. B.* 256.

Dimmock *vers.* Chandler.

A Prohibition was moved for to the Admiralty in a suit there brought by one part-owner against the other, who would go to sea with the ship, in order to oblige him to give security. And *Carth.* 26. *Hardr.* 473.^m were cited. But the court said, those cases were denied, 7 *Ann. Grave v. Hedges*, (a), and that if security was offered and refused, they would grant a prohibition; but not before (1).

Admiralty.
Fitzg. 197.
1 Barn. B. R.
415. S. C.

(a) Holt 470.

(1) *Lambert v. Acretree*, 1 *Ld. Raym.* 223. *Blacket v. Ansley*, 1 *b.* 235. *De Grave v. Hedges*, 2 *Ld. Raym.* 1285. *Quære*, if not S. C. cited *supra*. *Ouston v. Hebden*, 1 *Wils.* 101. 1 *Com. Dig.* Admiralty (F. 1.) 394.

Doldern *vers.* Feast.

PER curiam, We have seen so much oppression in letting the sheriffs officers be bail, that we think proper to concur with the Common Pleas in a general rule, not to accept them or serjeants at mace (1).

Sheriffs officers
ought not to be
bail.
1 Barn. B. R.
417. S. C.

(1) R. M. 14 Geo. 2. Reg. 2. rule extends to the Keeper of the *Bolland v. Pritchard*, In C. B. *Poultry Compter*, *Hawkins v. Mag-*
Black 799. *Loffi.* 153. This *nall*, *Doug.* 466.

Vol. II.

R

The Executors of the Duke of Marlborough against Wide more.

Amendment.
Fitzg. 193.
better reported
1 Barn. D. R.
408, 418.
S. C.

THE plaintiffs declared as executors on a promise to their testator; and issue was joined on a plea of the statute of limitations. Then the plaintiffs moved to amend, by laying the promise to have been made to themselves; and cited 3 Lev. 347. where in an action upon the statute of hue and cry the allegation of the oath was amended, and laid to be by the servant instead of the master.

And on the authority of this case the court ordered the amendment, on payment of costs and liberty for the defendant to plead *de novo* (1). *Strange pro def.*

(1) Otherwise the statute of limitations could have barred the action. *Vide Nisbett v. Griffith*, Say. 97. *Anbeer v. Barker*, 1 Wils. 149. Upon which ground the court gave leave to amend an information for killing a hare, by altering the parish where the offence was laid, because the three months within which it must be filed were elapsed. *Howell qui tam v. James*, B. R. 1 Wils. 103. But in *Geff. qui tam v. Popplewell*, 2 Term. Rep. 707. where a qui tam action had depended four years, the court refused to allow the plaintiff to amend his declaration though the pleadings were in paper, because it would in effect amount to a permission to bring another action to which the defendant might otherwise plead the statute of limitations. *Vide also Du v. Pilkington* 4 Burr. 2447.

[891]

Butler *vers.* Inneys et ux.

Pauper.

THE plaintiff sued as a *pauper*, and was nonsuited; after which he brought a second action, and recovered. And *Strange* moved on behalf of the defendants, that the costs in the first action might be deducted out of the recovery in the second, but it was refused.

Vice *vers.* Burton.

Mesugium sive tenementum is well enough in trespass.
Ante 84.

IN trespass for *mesne profits*, the declaration was for an entry into *mesugium sive tenementum*. And on error it was objected so for the uncertainty; and a case cited, where it had been held ill in ejectment. To which it was answered, and resolved by the court, that there was a very essential difference; because in ejectment it will be uncertain, of what the sheriff is to deliver

Hilary Term 4 Geo. 2.

deliver the possession. So the plaintiff in error went over to an exception to the writ of error, which was quashed, being returnable before judgment.

Dominus Rex *vers.* Bettelworth.

MANDAMUS to grant administration to *John Cullom*, of *Joan* his wife. Return, that by articles before marriage it was agreed, that the wife should have power to make a will, and dispose of her leasehold estate; that pursuant to this power, she made a will, and her mother executrix, who has duly proved the same.

Though a feme has power to make a will, yet the baron shall have administration.
1 Barn. B. R. 324. S. C.
But no judgment
MSS. 37. S. C.
1 Mod. 211.

To this return it was objected, that she might have *choses en action* not covered by the deed, and the husband was in all events intitled to an administration *quoad* them.

E contra it was insisted, that with the consent of the husband she might make a will. 2 Mod. 170. And here is his consent by being party to the deed.

Sed per curiam, A general consent to make a will does not seem sufficient, but there should be a consent to that particular will; besides, this is going beyond her power, which did not extend to the making an executor. This is rather an appointment, which in equity will controul the administration as to the leasehold estate, than a will; and as there may be other effects not covered by the deed (1) the return is ill, and there must be a peremptory *mandamus*.

(1) *Vide* *Rex v. Bettelworth*, *post*. 1118. and *Rex v. Bettelworth*, *post*. 1111.

Smith's Case.

[892]

MR. Reeve moved for a *mandamus* to Dr. Bettelworth, commanding him to grant administration to *Smith* of the goods of his deceased son, *durante minori etate* of his grandson.

Mandamus lies not for an administrator *durante minori etate*.
1 Barn. B. R. 370, 425.
Fitzg. 163.
Cit. And. 366.
3 Bac. Abr. 552.
MSS. S. C.

Fazakerley contra insisted, that the father has not an equal right with the son; and that the spiritual court has always considered these administrators only as trustees for the infant, and have never kept to any rule in granting them, but according to the circumstances of the family; where there are several in equal degree,

Hilary Term 4 Geo. 2.

degree, as children, they have always chosen which they pleased.

Et per curiam, When we grant *mandamus's*, it is to oblige the judge to do right to the party who sues the writ; but as there is no law which says to whom these administrations during minority shall be granted, there is no law to be put in execution. (1). In the case of the next of kin he is intitled *de jure*, and therefore in his case we grant a *mandamus* of course (2). We will grant no writ in this case.

(1) *Anon. And. 24 S. P. Vide Rex v. Bettefworth, post. 956.* (2) *Anon. ante 552.*

Baynes *vers.* Forrest.

Variance.
1 Barn. B. R.
428. S. C.
6 Com. Dig.
Record.
(C.) 173.

UPON the issue of *nul tiel record*, the *scire facias* recited a judgment for damages *pro non performance cujusdam promissionis et assumptionis*: and on producing the record it was *several* promises, and intire damages. And the court held it a variance; and the plaintiff quashed his *scire facias* with costs, the court refusing to amend it.

The Sword-blade Company *vers.* Dempsey.

Amendment of
writ of error.
Fitzg. 201.
1 Barn. B. R.
405, 421. S. C.

AN ejectment was brought against the Company and Mr. Edwards. After a verdict for the plaintiff, Mr. Edwards died, and a writ of error is brought laying the judgment to be *ad grave damnum* of the Company, and of Mary Edwards the daughter and heir. And she and the Company jointly assign errors.

It was moved to amend the writ and assignment, by striking out her name. And upon consideration the court were of opinion, that it was amendable by the statute 5 Geo. 1. c. 13. not only as a *variance* from the original record, which is really no way to the damage of Mary Edwards, but also by virtue of the general words *other defect* (1).

Vide post: 973:

(1) *Vide Verelst and Smith v. Rafasl, Cowp. 425.*

Symes *vers.* Oakes.Shepherd *vers.* Oakes.Lavender *vers.* Oakes.

ON error *e. C. B.* in actions of debt on bail bonds, it was excepted by *Filmer*, that it was not shewn, that the bonds were to the sheriff by the name of office, as the statute 23 H. 6. c. 10. requires. And the court held, that it should so appear (1); but they thought it did sufficiently appear on the whole declaration, they being laid *solvend' eidem vicecomiti et assignatis. Strange pro quer'*. Judgment affirmed.

What amounts to shewing a bail bond taken by the name of office.

(1) 2 Jones 138.

Dominus Rex *vers.* Ward.

MANDAMUS to admit *Henry Dryden* to be deputy register of the archbishop of *York's* court, suggesting that *Dr. Thomas Sharpe* had been admitted to the office, to execute the same by himself or his deputy, that he had appointed *Dryden* (who is averred to be a fit person) to be his deputy, whom the commissary had refused to admit, to the great damage of *Dr. Sharpe* who complains, and therefore the writ commands the commissary to admit and swear *Dryden*, or shew cause to the contrary. To this the commissary returns, that long before the constituting *Dryden* to be deputy, *John Sharpe* and *Thomas Sharpe* were admitted into the office as principals, to hold for their lives, and the life of the survivor. That they 11 March 1714, appointed *John Shaw* to be their deputy, who executed the office till *John Sharpe* died. That *Thomas Sharpe* survived, and 12 May 1727, by a new appointment constituted *Shaw* his deputy, who was admitted and executed the office, until suspended in the manner after mentioned. That *Shaw* at the times of his admission took an oath that he would justly and honestly execute the office without favour or reward, and do every thing incumbent on the office, and not be an exactor or greedy of rewards. That by the canons of 1603, it is (*inter alia*) ordained, that if any register or his deputy should receive any certificate without the knowledge or consent of the judge, or omit to call over any person cited to appear, or put off the examination of witnesses, or disobey the judge, or omit to enter the decrees before the next court day, or not register wills within a convenient

Mandamus lies for the principal register of the Archbishop's court to admit and swear his deputy, but it will do lie for the deputy himself, he being an officer at will. It lies notwithstanding that this is a spiritual office.

The writ need not aver that the person to whom it is directed, is the person to whom it appertains to admit and swear.

Fitzg. 1. 104.
1 Barn. B. R.
252. 294. 380.
11.

3 Bac. Abr. 531.
S. C.
MSS. S. C.

time, or enact any thing false, or of his own conceit, in the decrees, or take any reward from either party, or be of counsel with them, or do any thing that may scandalize the judge; then such register or his deputy may be suspended by the bishop for the space of one, two or three months, or more, according to the degree of his offence, and the bishop shall appoint some other publick notary to execute the office during the suspension. That whilst *Shaw* was deputy, several proctors of the court 16 February 1727, exhibited to the commissary several articles against him (which are set out in *hac verba*) complaining of divers misbehaviours in his office, contrary to several of the particulars set forth in the canons. That *Shaw* being summoned 6 April 1728, gave in his answer in writing (which is set forth, and then the return goes on with a *quia videbatur* to the commissary, that the answer was insufficient, and that *Shaw* had confessed himself guilty of several omissions and extorsions in the exercise of his office; therefore upon complaint thereof to the archbishop, he 21 May 1728, by his commission under his archiepiscopal seal directed to the commissary, and reciting that *Shaw* had been guilty in the manner before mentioned, he therefore impowers the commissary to suspend him and assume another notary publick. That by virtue hereof he, 24 May 1728, suspended *Shaw* for five years, and assumed *Joseph Leach* a notary publick, who before the constituting *Dryden* to be deputy took upon him, and has ever since exercised the office. That *Shaw* appealed, and in that appeal alleged, that 23 May 1728, he resigned the office, and that Dr. *Sharpe* had appointed *William Smith* to be deputy. That delegates were appointed, who 23 October 1728, issued an inhibition to the commissary, that pending the appeal he should do nothing to the prejudice of the appellant. That the appeal remains undetermined, and for these reasons he cannot admit *Dryden* to be the deputy of Dr. *Sharpe*.

Strange argued that the return was ill, and there ought to be a peremptory *mandamus*.

I must observe in general, that there is no incapacity returned in *Dryden*, no want of any regular appointment or deputation; on the contrary it appears that Dr. *Sharpe* had a power to make a deputy, and that he has executed it with regard to Mr. *Dryden*. As therefore *Dryden* has *prima facie* a regular title to the office, the commissary who is to admit him ought not to refuse to do his duty; especially considering that the admission gives no right, but only a legal possession, to enable him to assert his right, if he has any. And upon this foundation it is, that *non fuit electus* has been held no good return to a *mandamus* to swear in a church-

churchwarden (*Mich. 11 Geo. Rex v. White*) (a) because it is directed only to a ministerial officer, who is to do his duty, and no inconvenience can follow; for if the party has a right, he ought to be admitted, if he has not, the admission will do him no good. This effect of a *mandamus* to admit, was laid down in the case of the King against the Dean and Chapter of *Dublin, Hil. 7 Geo.* which was a *mandamus* to admit one *Dougate* to his seat in the choir and his voice in the chapter. Wherever the officer is but ministerial, he is to execute his part, let the consequence be what it will. *Mich. 11 Geo. Rex v. Simpson.* That was a *mandamus* to the archdeacon of *Colchester*, to swear *Rodney Fane* into the office of churchwarden. The archdeacon returned, that before the coming of the writ he received an inhibition from the bishop; but the court held that was no excuse, and that a ministerial officer is to do his duty, whether the act would be of any validity or not. In the case of *Taylor v. Raymond, Mich. 4 Geo.* to a *mandamus* to swear in a churchwarden, it was returned, that before the coming of the writ he had sworn in another; and held an ill return, for be the right which way it will, the officer is to do his duty. These cases are both in point: in one there was an inhibition (as there is in this case) and in the other there was another officer, as they pretend there is here, viz. *Joseph Leech*.

(a) 2 Ld. Raym.
1379.
8 Mod. 325.
S. C.

Barnard. K. B.
381.

[895]

Ante 536.

Ante 609d

But what is that inhibition? it is to do nothing that may prejudice the appeal. Can this hurt *Shaw*? no: if he is relieved on the appeal, he will be restored, though another is admitted. If he is not relieved, it must be for want of a right, and he will not be capable of suffering any prejudice by the other's admission. But what takes off all pretence of the inhibition's being material in this case is, that it appears by *Shaw's* own shewing, that he had the day before his suspension surrendered his deputation; and that accounts for the last part of the return, that the appeal is undetermined, it not being of any consequence to *Shaw* to prosecute it any further. Besides, this would be to deprive Dr. *Sharpe* of the benefit of this office as long as *Shaw* shall think fit to sleep upon the appeal; Dr. *Sharpe* having no power to expedite the determination,

A deputy is but at will, and this is to deprive Dr. *Sharpe* of his will for five years, which suspension I take to be illegal; for the words *or more* which are added in the canon, must have a reasonable construction, and can never be extended to five years, *Shaw* is intirely divested of the office, which answers the purpose of reformation better than a bare suspension. As therefore the office is vacant, there can be no reason why the com-

missary should refuse to fill it up, and a peremptory *mandamus* ought to go.

1. Raym. 1405.
3 Mod. 380.
1 Burn. B. R.
411. S. C.
12 Mod. 2, 3.
Ante 625.

[896]

Filmer contra. The cases of churchwardens have been denied; and it has been since determined in *The King v. Harwood*, that *non fuit electus* is a good return (1): and *Pasch. 11 Geo. Rex v. Pender*, it was held a good return, that the party praying the *mandamus* had had judgment of *ouster* against him in an information in the nature of a *quo warranto*. The principal ought to suffer in some degree for the faults of his deputy, nor ought the principal to defeat the punishment of his deputy by accepting a surrender of the deputation.

Sed per curiam, Surely it is attempting too much, to support this as a good return: the effect of a *mandamus* as laid down is certainly so; that it gives no right. The canon only intended, that the bishop should suspend, where the principal would not revoke; but an actual revocation is better than a suspension. It would be carrying the power of inhibitions a great way, if we should allow it the force contended for by the return: we are therefore all of opinion the return is ill.

Then *Filmer* took exceptions to the writ. 1. That a *mandamus* would not lie for a deputy. 2. Nor for a spiritual office as this is; and 3. It is not averred in the writ, that *Dr. Ward*, to whom it is directed, is the person bound to admit and swear.

1. As to the first objection he cited 6 *Mod.* 18. where *Holt C. J.* lays it down, that a *mandamus* will not lie for a deputy.

2. As to the second he cited 3 *Mod.* 322. *Carth.* 169. 3 *Lev.* 309. *Show.* 217. that a *mandamus* will not lie for a proctor, who belongs as much to the ecclesiastical court as the register.

3. It is the constant form to allege, that the party to whom the writ is directed, is the person to whom it appertains to swear and admit. *Trem. Ent.* 452.

Strange contra. To the first objection, this is not a *mandamus* for the deputy, but for the principal to be admitted to have a deputy: the refusal of *Dryden* is laid to be *ad grave damnum* of *Dr. Sharpe*, *sicut ex querela sua accepimus*, and therefore to do him (*Dr. Sharpe*) right in the premises, is the writ awarded. It ap-

(1) *Regina v. Twitty*, *Salk.* 1379. *Rex v. Doctor Harris*, 3 433. *Rex v. Rice*, 1 *Ld. Raym.* *Burr.* 1420. *Rex v. Penrice*, 194. 138. *Regina v. Guise*, 2 *Ld.* 1235. *Raym.* 1008. *Rex v. White*, *ib.*

pears Dr. Sharpe has a freehold in the office, so though his deputy is but at will, *he* has it for life. 1 Vent. 110. a mandamus was granted to restore *A.* to the office of deputy steward of the court of the council of Marches. And it was held to lie for a revocable deputy, because the principal has no other way to get him admitted. And in the report of the same case in 1 Lev. 306. it is said *per curiam*, Though a mandamus does not lie for a deputy, yet it lies for him who deposes him, to have him admitted or restored; for otherwise he may be deprived of his power to make a deputy.

2. As to the nature of the office. Its being an office subject to the ecclesiastical court is no objection. Trin. 3 Geo. 1. Rex v. Ballivos de Morpeth. Ante 58. A mandamus to admit an under school-master; and yet school-masters are within 77 and 79 canons of 1603. as well as registers. So in the case of Mr. Folkes lately, for the office of apparitor general of the Archbishop of Canterbury. It has been often granted for a sexton and parish clerk. 1 Vent. 143. Hil. 4 Geo. Davis's case for a parish clerk. And the same term Rex v. Parochian' de Thame for a sexton, Trin. 9 Geo. to restore Dr. Bentley to the degrees of bachelor of arts and doctor of divinity. And Dr. Sherlock's case, to admit him a prebend of Norwich, Trin. 4 Geo. And Dougate's case before cited. Ante 115. Ante 557. Ante 159. Ruding v. Newell, post. 983.

No assize will lie for this office; so if the party has not this remedy, he has none. The reason why it was refused to a proctor was, because it did not appear what interest he had, but here appears a freehold. Carth. 170. is a mandamus to admit a register of an archdeacon of Sarum. And Trem. 536. for the like at Exon.

3. If Dr. Ward was not the person to whom the executing this writ belongs, he should have returned so, (Trem. 453.) but instead of that he is making an excuse; besides, it is laid that *minus rite* he refuses, which is an averment that in justice he ought to do it. And as to precedents, they are both ways. Tremayne 450. 461. 465. 483. and several precedents were produced from the rolls. Mich. 2 Ann. rot. 61. Trin. 3 Ann. rot. 35. Hill. 22 Car. 2. rot. 218. Vide Rex v. Wigan, 2 Burr. 782. that it is at the peril of him who sues out the writ to direct it to the person proper to execute it.

Et per curiam, We all think this writ is good, notwithstanding the exceptions that have been taken, and therefore a peremptory mandamus must go (2).

(2) The court here permitted the party, after making a return, to object to the writ. *Et vide* Rex v. College of Physicians, 3 Burr. 740. when the writ was quashed after a return made. But in Rex v. Mayor of York, 5 Term Rep. 74. the court held, that the party by making a return had precluded himself from objecting to the writ; and see the cases *contra* cited *ib.* in the note.

Easter Term

4 Georgii 2. Regis. In B. R.

Robert Lord Raymond, *Lord Chief Justice.*

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

William Lee, *Esq;*

} *Justices.*

Sir Philip Yorke, *Knt. Attorney General,*

Charles Talbot, *Esq. Solicitor General,*

Harman *vers.* Delany.

What a libel,
actionable.

Fitzg. 121. 253.

1 Barn. B. R.

289. 438 S. C.

4 Com. Dig.

Libel, (A. 3.)

713.

IN an action upon the case for a libel, the plaintiff declared, that he was gunsmith to his Royal Highness the Prince of Wales, and that it having been inserted in the *Craftsman*, that he had had the honour to present him a gun of two feet six inches long, which would shoot as far as one of a foot longer, and had kissed the Prince's hand on being appointed his gunsmith; the defendant, intending to scandalize him in his trade, published an advertisement in these words, "Whereas there was an account in the *Craftsman* of John Harman gunsmith making guns of two feet six inches to exceed any made by others of a foot longer, (with whom it is supposed he is in fee) this is to advise all gentlemen to be cautious, the said gunsmith not daring to engage with any artist in town, nor ever did make such an experiment, (except out of a leather gun) as any gentleman may be satisfied of at the *Cross Guns* in *Longport*." After Not guilty pleaded, there was a verdict for the plaintiff and 50*l.* damages.

It was moved in arrest of judgment, that this is no libel, and that if one tradesman will pretend to be a greater artist than others, it is lawful for them to support their own credit in the same way.

Et per curiam, That is certainly so, and if the defendant had gone no farther he would not have been chargeable; they might advertise that they make as good as he, but they ought not to say he is no artist, which they plainly do by saying he dares not engage with any artist, and by advising gentlemen to be cautious of him: the law has always been very tender of the reputation of tradesmen, and therefore words spoken of them in the way of their trade will bear an action, that will not be actionable in the case of another person: and if bare words are so, it will be stronger in the case of a libel in a publick news-paper, which is so diffusive. 1 *Mod.* 19. 1 *Roll. Abr.* 63. pl. 30. *Cro. El.* 343. 1 *Roll. Abr.* 62. pl. 28. *Hetley* 71. *Brownl.* 151. 2 *Mod.* 118. 5 *Ca.* 125. *Hard.* 470. 1 *Keb.* 293. 1 *Roll. Abr.* 37. pl. 15. *Skinner* 123. *Hob.* 225. *Mo.* 627. 2 *And.* 40. *Hutt.* 125.

The plaintiff had judgment, the court being of opinion, that it tended to discredit him in his business,

Medlicot's Case. In Canc.

A Commission of bankruptcy was superseded, because granted upon the petition of an assignee of a bond; who though he is an equitable, yet is no legal creditor (1).

Assignee of a bond cannot petition for a commission of bankruptcy. *Caf. temp. King C. dec. 6.*

(1) *Ex parte Hylliard*, 1 *Atk.* 147. 2 *Vex.* 407. *Ex parte Lee*, 1 *P. Wms.* 782.

Seymour, Bart. qui tam vers. Day.

THE action was for the penalty in killing a hare, not being qualified. And the jury found for the defendant, contrary to the direction of the Judge. But the court refused a new trial, saying it had never been carried so far as a penal action (1).

No new trial in a qui tam after verdict pro def.

(1) *Vide Mattison qui tam v. Mattison*, post. 1238. But note, they will grant one where the whole merits of the case have not been laid before the jury, either through the mistake or mis-direction of the Judge. *Wilson v. Rastall*, 4 *Term Rep.* 758. *Vide* the cases there cited, and 5 *Com. Dig. Plunder*, (R. 17.) 502.

Moore *vers.* Goodright.

Assigning for error the death of the plaintiff in ejectment is a contempt (1).

[900]

UPON a writ of error *coram vobis*, it was assigned for error, that the plaintiff in the ejectment died before the day of *nisi prius*. And it being in ejectment, the court set it aside, and ordered the attorney to shew cause, why there should not be an attachment against him; for they said it was to defeat the proceedings instituted by the court to try the right; and every body knows that the plaintiff is but nominal, or if a real person, yet his release is a contempt.

(1) *Vide* Rex v. Burridge, ante 593.

Goodtitle *vers.* Holdfast.

Practice.
3 Mod. 345.
30 Mod. 383.

AFTER judgment against the casual ejector, and before any writ of possession executed, the court made a rule to stay proceedings on payment of all rent due and costs: it not being pretended that the ejectment was brought on any other title, than a re-entry for non-payment of rent.

Dominus Rex *vers.* Catherall.

3 & 4 W. & M.
c. 12.
3 & 9 W. 3.
c. 37.
In convictions
for non-payment
of money the
sum must be
mentioned.
Fitg. 266.
1 Barn. B. R.
427. 442. S. C.
Vide ante 497.
2 Ld. Raym.
900.

THE defendant was convicted on the *Kensington* turnpike act for refusing to account and pay over the money by him received as collector. And being committed, and a *habeas corpus* brought, the defendant was discharged, and the conviction quashed; because no particular sum was specified, or the times when the money was charged to be received, so as to enable him to defend himself on a second charge. And though the counsel for the trustees would have had the commitment stand good as to the not accounting; yet the court said it was one intire non-seazance charged both in the conviction and commitment, and they would not sever them (1). The defendant was discharged, and the conviction quashed (2).

(1) *Vide* Rex v. Hale, Cowp. 328. counsel for the trustees applied for leave to amend the conviction, but being filed, it was refused.

(2) From the other reports of this case it appears, that the

Dominus Rex vers. Inhabitantes de Hamworth in com' Staff'.

UPON motion to quash a *certiorari* to remove an indictment against the defendants at sessions, for not repairing a bridge; it was insisted, that by 1 *Ann. c. 18.* the *certiorari* is taken away. To which it was answered, and resolved by the court, that this act extended only to bridges where the county is charged to repair; and that where a private person or parish is charged, and the right will come in question, the act 5 & 6 *W. & M. c. 11.* had allowed the granting a *certiorari*. And therefore they refused to quash (1).

Certiorari may be granted where private persons are charged to repair a bridge 1 *Seff. Ca. p. 415. No. 329.* 1 *Barn. B. R. 445. S. C.*

(1) And according to 1 *Seff.* being laid by way of recital, and *Ca. 415.* the indictment was affirmed positively. *Vide 2 Hawk. P. C. afterwards quashed, the charge 25. sect. 60. p. 323.*

Dominus Rex vers. Stoughton.

INDICTMENT against defendant for a nuisance, charging that he *sepem levavit vel levare causavit*. And on demurrer judgment was given for the defendant, on account of the uncertainty of the charge. *Vide Rex v. Stocker in Salk. 342. 371. and 5 Mod. 137. (1).*

[901]
Levavit vel levare causavit, ill. 2 *Seff. Ca. p. 25. No. 30.* 1 *Barn. B. R. 347. 425.*

(1) *Rex v. Flint, B. R. Cas. ch. 25. sect. 58. p. 321. 4 Com. 370. 2 Hawk. P. C. Dig. Indictment, (G. 3.) 394.*

Dominus Rex vers. Morris.

AFTER conviction on an indictment the judgment was arrested, because the words *ad tunc et ibidem* were left out to the swearing of the jury. 1 *Mod. 26. 1 Vent. 60. 2 Keb. 3. 610.*

The jury must appear to be sworn in the county. *Fitzg. 266. 1 Barn. B. R. 443. S. C.*

Cooke qui tam vers. Champneys.

IN an action for the escape of *Sarah Chatford*, who was taken upon an outlawry on *mesne* process; *Gapper* moved in arrest of judgment, that the action would not lie, for the plaintiff is at the end of his suit, and the King only has an interest for the

Action upon the case lies for the escape of an outlaw. *Fitzg. 265. 1 Barn. B. R. 454. S. C.*

forfeiture, and the body is kept for the contempt; and cited *Cro. El.* 706. 13 H. 4. 1. Salk. 80.

Yelv. 20.

Drapet contra. The case in *Cro.* is of debt on the statute of R. 2. But it was never doubted but case would lie. *Cro. El.* 652. *Cro. Jac.* 360. It will lie for the escape of one taken on an *excommunicato capiendo*. *Lutw.* 122. 2 *Bulst.* 236. 1 *Roll. Rep.* 47. *Mo.* 834. So for the escape of one committed by commissioners of bankruptcy.

Et per curiam, He may never be taken again, and the confinement would have enforced his appearing to the action, to reverse the outlawry: so the plaintiff has an interest and a damage, and must have judgment.

Dominus Rex vers. Japhet Crooke.

Indictment of
forgery on 5 El.
c. 14. that A.
being seised of
Jawick, the de-
fendant forged a
conveyance of
Jawick park, for
a forgery with
intent to charge
is within that act.
Fitzg. 57. 261.
more full.
1 Barn. B. R.
168. 441. 461.
S. C.
Vide 1 Hawk.
P. C. ch. 76.
sect. 12. 339.
2 Bac. Abr. 571.
[*902]

THE defendant was convicted on the statute 5 *Eliz. c. 14.* for forging a lease and release. And the indictment sets forth that *Garbut et uxor* were seised in fee of certain messuages, lands and tenements called *Jawick* in the parish of *Clackton* in *Essex*, and that the defendant intending to molest them and their interest in the premises, forged a lease and release as from *Garbut et ux'*, whereby they are supposed for a valuable consideration to convey to him "all that park called *Jawick Park*, in the parish of *Clackton* in *Essex*, containing eight miles in circumference, "with all the deer, woods, &c. thereto belonging."

*After verdict *pro rege*, it was moved in arrest of judgment, that the premises supposed to be conveyed were so materially different from those which were really the estate of *Garbut et ux'*, which was houses, lands, and tenements; that it was impossible this conveyance ever could molest or disturb them: if it was a true deed, it could not pass their lands at law for want of a proper description; and though where lands are improperly described, a court of equity will oblige the vendor to convey them by proper words; yet that is only where there is a previous contract for a sale, and they do it as carrying that contract into execution; whereas here is no contract, and the case is no more than if *A.* had been seised of *Blackacre*, and *B.* had forged a conveyance of *Whiteacre*, which certainly would not be within the statute,

The court for several terms inclined strongly with the objection: but this term the Chief Justice declared that they were all of opinion to over-rule it: the words of the act are, "to the intent

“ intent that the state of freehold or inheritance of any person
 “ to any lands, &c. or the right or title of, in and to the same,
 “ shall or may be molested, troubled, defeated, recovered or
 “ charged.” By this it appears, that it is not necessary, there
 should be a charge or a possibility of a charge; it is sufficient
 that it be done with that intent, and the jury have found that
 it was done with intent to molest *Garbut* and his wife in the
 possession of their lands. Accordingly judgment was given for
 the King, and the defendant had sentence to undergo the pu-
 nishment appointed by the act for forging a deed, and the same
 was executed upon him at *Charing Cross*.

Gardner vers. Merrett.

THERE was a variance between the writ of error and
 the record; and as it stood in the paper, the court ob-
 served it, but neither party would move to amend it, for fear of
 paying costs: upon which the court said the statute 5 Geo. 1.
 c. 13. would warrant their amending it, which they did with-
 out costs.

5 Geo. 1. c. 13.
 The court may
 ex officio amend
 a writ of error.
 1 Barn. B. R.
 462.
 Fitzg. 268.
 L. Raym. 1587.
 S. C.

Regula generalis.

THE court taking notice of great inconveniences follow-
 ing from holding a warrant to confess judgment by one
 in custody to be good, if any attorney (though for the opposite
 party) was present; made a rule, that for the future there should
 be an attorney present on the behalf of the defendant (1).

No warrant of
 attorney from a
 prisoner good but
 where there is
 an attorney *pro*
def present.

(1) Similar rule in *C. B. Reg.*
 4 Geo. 2. But this rule extends
 only to cases where the party is
 in custody upon mesne process.
Watkins v. Hanbury, post. 1245.
Hill v. Riley, Cowp. 281. *Birch*
v. Sharland, 1 Term Rep. 715.
 and at the suit of the party for
 whom the warrant to confess
 judgment is given. *Finn v.*
Hutchinson, 2 Ld. Raym. 797.
Hilcombe v. Wade, 3 Burr. 1792.
Gillman v. Hill, Cowp. 142.
Charlton v. Fletcher, 4 Term Rep.
 33. And it does not include
 the case of prisoners in custody of
 the marshall. *Parkinson v. Caines*,
 3 Term Rep. 616. Neither does
 it extend to cases where the de-
 fendant is himself a practising at-
 torney. *Walton v. Stanton*, Barnes
 37. or where being acquainted
 with the rule, the defendant means
 to convert it into an instrument of
 fraud. *Gillman v. Hill*, Cowp.
 141. But within these exceptions
 it must be complied with in all
 cases. *Woodin v. College*, Ann.
 177. even though the warrant be
 executed out of England. *Fitz-*
gerald v. Plunket, post. 1247. But
 even in cases not strictly within
 the

the rule, if the defendant has been oppressed or imposed upon, in consequence of such a warrant signed without the presence of an attorney acting for him. Both courts will relieve him from the

judgment. *Ruffle v. Hitchcock*, 2 Black. Rep. 1097. in C. B. *Warraker v. Gascoyne*, ib. 1297. *Parkinson v. Caines*, 3 Term Rep. 616. in B. R.

[903]

Philips *vers.* Knightley.

Award that *A.* shall execute a covenant to indemnify *B.* is good.

Fitzg. 53. but not S. P. Ib.

167. 279. S. P.

1 Barn. B. R.

84, 151. but not S. P. Ib.

387. 457. 463.

S. C. S. P.

IN debt on an arbitration bond. It appeared that the award was, that the defendant should execute a covenant to indemnify the plaintiff against all costs, damages and expences, which should happen by means of any further proceedings in an action begun at the instance of the defendant, and at issue in *C. B.* wherein *Marshall qui tam* is plaintiff, and the now plaintiff defendant; at the bottom of which covenant the arbitrators had signed their names.

Page Justice thought this a bad award, as not putting a final end to the suit, but only giving the plaintiff a new action of covenant: besides, it was not reducing things to any certainty. And *Mich. 9 W. 3. B. R. Selby v. Ruffel*, there was an award, that if no further demand was made out in ten days, releases should be given; which was held ill; and *Holt* Chief Justice said, they could not delegate their authority in any other instance, but that of ordering costs to be taxed by a master. 2 *Saund.* 192. *Salk.* 75. 2 *Keb.* 351. 1 *Sid.* 358. He said he should think it well enough, if a bond had been awarded, because there the penalty made all certain.

But the other Judges were of opinion, that the award was good, and that it did not lie in the mouth of the defendant to make this objection. And they said, there was no difference between a bond and a covenant, for the remedy is by action in both cases. And this being a *qui tam*, in which the poor had an equal interest with *Marshall*, it was not in the power of the arbitrators to order it to cease. They cited *Cro. Jac.* 400. and gave judgment for the plaintiff.

Between the Parishes of Curenden and Laland in Lancashire

Where the duty on apprentices is not paid the apprentice gains no settlement.

Fitzg. 167. 2 *Self. Ca. p.* 167. No. 134. 1 *Barn. B. R.* 379. 400. 466. 1 *Bott by Conf.* 48. pl. 679. S. C.

UPON a special order of settlement, it was stated, that a poor boy was bound out apprentice by indenture, and the master had 20s. paid him: that he served three years; but that

the master never paid the duty of 6d. in the pound according to 8 Ann. c. 8. § 39. which says, that if the duty be not paid, the indenture shall be void to all intents and purposes whatsoever.

The case was referred to *Fortescue* Justice, who went the circuit. And he held it a settlement, because master had six months to pay the duty in, so that during those six months a settlement was gained: and it should not be in the power of the master to defeat it by matter *ex post facto*. And pursuant to this opinion the sessions held it a settlement.

[904]

But upon debate in *B. R.* the order was quashed (1); for they said it was making the indenture good to one purpose, when the act of Parliament had made it void to all intents and purposes whatsoever. And though it was a hard case, they could not break through the positive words of the act. So the order was quashed (2).

(1) In *Rex v. Inhabitants of Nailand*, where a case had been by consent, referred to the Judge of assize for his opinion, *B. R.* held that it ought to be considered as final, and refused to enter into a discussion of the question, and discharged the rule for quashing the order of sessions. *Burr. S. C. 796.*

(2) *Vide Rex v. Holbeck, Burr. S. C. 198. Rex v. Llanvair Duffryn Clwyd, ib. 236. S. P.* But where the consideration money is under 20s. the indenture is not void for want of this stamp. *Baxter v. Faulam, 1 Wils. 129. Rex v. Tarmouth, Burr. S. C. 379.*

Dominus Rex *vers.* Dominam Lawley.

SHE moved in arrest of judgment after conviction on an information for attempting to persuade a witness not to appear and give evidence against *Japhet Crooke* for forgery. And the exception taken was, that it was not positively averred, that *Crooke* was indicted; it was only laid, that she, *sciens* that *Crooke* had been indicted, and was to be tried, did so and so: whereas in all criminal cases the fact must be positively alleged, and not by inference. 5 Co. 120, 6 Mod. 30. 4 Co. 44. b. 2 Cro. 19. 4 Co. 18. *Hardr. 2, 2 Bull. 292. 1 Roll. Rep. 70.*

Sciens in an indictment is a good averment. *Fitzg. 122. 263. 1 Barn. B. R. 263. 274. 287. 293. 459. S. C.*

But the court upon consideration held it was well enough; and that there is no real difference between indictments and informations, where the gist of the action must be positively averred. *Dans plagam mortalem; warrantizando vendidit; receiving stolen goods*
VOL. II. S

goods knowing them to be stolen; are all as loose. So is the case of keeping a dog knowing him to be accustomed to bite sheep. And there is no inconvenience; because if there was no such indictment proved at the trial, the defendant must have been acquitted. *Vide* 1 Sid. 183. 337. 2 Sid. 127. Salk. 686. 2 Lev. 208. 5 Co. 120. 2 Roll. Abr. 82. pl. 4. 9. 12. Dy. 69. a. Appendix at the end of the State Trials 50. where it is laid that the defendant *satis sciens* Sir Thomas Armstrong to have conspired the death of the King, and to have fled for the same, the defendant nevertheless traiterously remitted money to him for his support (1). *Judicium pro Rege*, and the defendant was fined three hundred marks, and to suffer one month's imprisonment.

(1) *Vide* Rex v. Loggen, ante 75. 2 Hawk. P. C. ch. 25. sect. 67. 327.

[905]

Man vers. Man, coram Magistro Rotulor⁹.

Bequest to wife for her life, if she should continue a widow, and after her death to A. B. C. and D. share and share alike, and the wife is made executrix. C. and D. die in testator's life-time. Their legacies lapse, and shall go to the executrix, and not according to the statute of Distributions.

(1) 2 Kely. 11. S. C. (2) (a) i. e. the wife.

SAMPSON Man made his will, and gave the use of his personal estate to the defendant his wife for her life, if she so long continue his widow, and after her death to A. B. C. and D. his brothers and sisters, share and share alike. C. and D. died in the life-time of the testator, and he died some short time after, not having revoked his will. A. and B. the two surviving legatées bring a bill against the executrix, suggesting a waste made by her of the estate, &c. and pray she may exhibit an inventory, and the estate may be secured, &c. The defendant set

(1) That legacies thus lapsed are to be considered as so much of the testator's estate undisposed of by will. *Vide* Bagwell v. Dry, 1 P. Wms. 700. Bindon v. Earl of Suffolk, ib. 96. The widow being executrix has been held a trustee for the next of kin of an undisposed surplus in *Randul v. Bookey*, 2 Vern. 485. *Ward v. Lant*, Preced. in Chanc. 184. *Gobfall v. Sounden*, 2 Eq. Ab. 444. In *Lady Granville v. Dutcheys of Beaufort*, 1 P. Wms. 115. In *Farrington v. Knightsley*, ib. 551. *Martin v. Rebow*, 1 Bro. Chan. Ca. 154. But where the thing

devised to the wife is an exception out of another devise to some other person, it shall not bar her from her right to the surplus as executrix. *Dutcheys of Beaufort's case*, 1 Bro. Par. Ca. 305. *Griffiths v. Rogers*, Preced. Chanc. 231. *Hoskins v. Hoskins*, ib. 263. *Jones v. Westcomb*, ib. 316. In *Newstead v. Jobbins*, 2 Atk. 45. *Lawson v. Lawson*, 7 Bro. P. C. 511. Et vide *Bell v. Smith*, 2 Vern. 675.

(2) Said in *Kelynge* to have been affirmed in *Dem. Prac.* but not reported in *Bro. P. C.*

out an account of the estate come to her hands, and what debts she had paid; but insisted that the shares of C. and D. the deceased legatees, did belong to her as lapsed legacies; and

Mr. Solicitor General insisted much, that the two shares did belong to the plaintiffs, the surviving legatees, and that by force of the statute of Distributions they as next of kin ought to have the shares. But Mr. Mead for the defendant argued, that it was the intention of the testator, his executrix should have them: for by the will the legatees are tenants in common, and shall not take the shares as survivors.

Sir Joseph Jekyll, The statute of Distributions only takes effect when the testator omits to make a disposition of an interest vested in him (3); as if he devises part of his estate, and takes

(3) The distinction taken here that the executor is to be considered as trustee of the surplus for the next of kin only, where the testator has omitted to dispose of it at the time of making his will, seems shaken by *Nichols v. Crisp*, Amb. 769. *Bennet v. Bachelor*, 3 Bro. Chan. Ca. 28. Where the residuary legatee dying in the life-time of the testator, the residue was decreed to be distributed. The reason also upon which it has been held that such residue shall be distributed instead of going to the executor, where there is a residuary clause, but the name of the residuary legatee is omitted, seems to militate equally against this position. Which is, because it shews that the testator, at the time of making his will, intended that the executor should not have the residue, by reason of his appointment, but that he meant to dispose of it in some other manner, although he forgot to specify how. Vide *Wheeler v. Sbaers*, Moss. 288. *Lord North v. Purdon*, 2 Vez. 495. *Bishop of Cloyne*

v. Young, 2 Vez. 91. In this last case Lord Hardwicke lays it down, "That as an executor must take by the will, if at the time of making it the intent appears that the executor should not take the beneficial interest in the surplus, no accident afterwards can give it him." So also in *Page v. Page*, ante 820. and in *Painter v. Salisbury*, before Sir Joseph Jekyll, cited 2 Vez. 93. 99. it was held that part of a residue becoming undisposed of by reason of the death of the legatees in the testator's life-time, it should be distributed, and not go to the executors. But there are these differences between the two last cases and the present; that in *Page v. Page*, the executors were themselves the legatees of the remaining specified shares of the residue; and both there and in *Painter v. Salisbury* the devise to the executors was absolute, and not of a particular interest as it is here. (Vide *Dutche's of Beaufort's case* ut supra,) and the next of kin were not the legatees of the other specified shares of the residue,

no notice of the other part in his will; he dies intestate *quoad* that part not devised, and then the next of kin claim under the statute, and they shall have it: but when an interest has been once disposed of, and the party who would have taken it, had he survived the testator, dying in his life-time, and the testator not making any other disposition of the share he would have had, in case he had survived the testator, nor any declaration shewing a design of altering his will; it is plain the testator, as he knew of the death of the legatees, did design (if he knew any thing of the law) that the executrix his widow should have the shares of the deceased legatees. And the survivors could not well take the shares, because the testator had particularly appointed that each of his legatees should have a special share. And he decreed, the wife should have the two shares absolutely to herself, and the use and interest of the other half for her life, and an account of the testator's estate to be taken. *Ante* 820. and the cases there cited,

In *Bishop of Cloyne v. Young*, 2 *Vex.* 91. however the case of *Page v. Page* is represented as being that of a devise of a residue to a wife for life, *she being also appointed executrix*, and after her death, to fix equally to be divided. And Lord Hardwicke reasons upon the case as if he considered her as being executrix, and acquiesces in the determi-

nation, that the sixth part that lapsed should go to the next of kin, *and not to her*, because the testator had declared his intent by his will to make a different disposition of the surplus of his personal estate, and that it should not go to his executrix by virtue of her being so, which opinion seems directly to contradict the present case.

Trinity Term

5 Georgii 2 Regis. In B. R.

Robert Lord Raymond, *Lord Chief Justice*:

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

William Lee, *Esq;*

} *Justices.*

Sir Philip Yorke, *Knt. Attorney General*:

Charles Talbot, *Esq; Solicitor General.*

Meard vrs. Philips.

IN debt for the penalty of articles relating to the building of Putney bridge. The defendant pleaded *Nil debet*. The plaintiff demurred, and the defendant joined in demurrer. Afterwards he moved, that he might be at liberty to withdraw his plea of *Nil debet*, and plead double, *vis.* that he was not appointed by the commissioners, and that he did not agree with them to build the bridge. And it appearing the plaintiff had not been delayed, the court gave leave accordingly (1).

12 Geo. c. 36.
General issue
waived and al-
lowed to plead
double.

(1) *Vide Wilkes v. Wood*, 2 *post.* 1267. *Taylor v. Joddrell*, *Wils.* 204. S. P. after issue join-^{ed} *Wils.* 214. *Sed vide Law v.* ed, and notice of trial given. *Law*, *post.* 960.
Vide also Blackbourne v. Matthias,

Trinity Term 5 Geo. 2.

Squire *vers.* Archer.

Bringing money into court.
2 Barn. B. R.
4 S. C.

IN an action for dilapidations the court refused to let the defendant bring money into court, and said it was like trespass, where you cannot do it, though you may tender amends (1).

(1) *Vide* 1 Comp. Pra^{er}. 150. Dig. (C. 10) 320. for the case
Imp. Pra^{er}. K. B. 256. 5 Com. upon this subject.

[907]

Wilcocks *vers.* Huggins.

An executrix sues upon a promissory note to her testator, and dies before judgment, the six years from the cause of action being then expired. Her executor brings a new action within four years after the death of the executrix, and the statute of Limitations having been pleaded, judgment was given against the plaintiff, and held, that he ought to have commenced the action within a year.

S. C. much fuller
Fitzg. 170. 289.
1 Barn. B. R.
335. 349. 382.
2 Barn. B. R.

5.
15 Vin. Abr.
103. S. C.

(a) According to the other reports a latitat.

Ante 550. 736.
Lutw. 261.
1 Ld. Raym.
432. Kinsey
and Hayward.

CASE by the executor of the executrix of *George Wilcocks* against the defendant upon a promissory note dated 30 July 1719. The defendant pleaded, *quod causa actionis non accrevit infra sex annos*: the plaintiff replies, that the first executrix, *Trin.* 11 Geo. 1. sued out a bill of *Middlesex* (a) against the defendant, returnable *Mich. sequen'*, on which there was a continuance by *non misit breve*, and an *alias* was taken out returnable in *Hilary* term following, before which the executrix died, and made the plaintiff her executor, who in *Michaelmas* term 3 Geo. 2. sued out a *latitat* against the defendant, with intent to declare against him as above, which he accordingly did; and concludes with an averment, that the cause of action accrued within six years before suing out the first bill of *Middlesex*.

To this the defendant demurs: and after several arguments, it was held, that the replication was ill, there being four years between the death of the first executrix and the proceeding by the now plaintiff: that the most that had ever been allowed was a year, and that within the equity of the proviso in the statute, which gives the plaintiff a year to commence a new action, where the judgment is arrested or reversed: but they said they would not go a moment farther, for it would let in all the inconveniences which the statute was made to avoid (1). Indeed if the second executor had been retarded by suits about the will or administration, and he had shewn that in pleading, it would have been otherwise, because then the neglect would have been accounted for. And wherever a suit is allowed to be continued

(1) *Vide* *Letbridge v Chapman*,
Mich. 3 Geo. 2. cited *Fitzg.* 171.
289. Where an administrator
brought an action 14 months
after the intestate's death, and
held not barred. *Vide* 6 Com.
Dig. Temps. (G. 17.) 344.
1 Com. *Dig. Action upon the Case*
upon Assumpsit, (H. 7.) 221.

by journeys accounts, it must be a recent prosecution. 6 Co. Spencer's case, which this can never be said to be. *Per curiam*, Judgment for the defendant.

Berkley *vers.* Howard.

ON error of a judgment by default, the plaintiff in error assigned the want of an original, and warrants of attorney. And the defendant, without putting him to return *certiorari's*, pleaded *in nullo est erratum*. And on argument the plaintiff insisted, that it was a confession of the errors; and it was agreed so to be. But upon application to the court, and affidavit that there was an original and warrants of attorney, the court awarded two *certiorari's*, it being in order to affirm a judgment (1).

A *certiorari* lies to affirm a judgment, after in *nullo est erratum*. 2 Barn. B. R. 5.

(1) *Meredith v. Davies*, Salk. 270. *Bellew v. Scott*, ante 440.

Warren *vers.* Ivie.

[908]

IT was moved upon the act for amendment of the law, that the defendant might be at liberty to rejoin double; but the court held it extended only to the case of pleading at first.

Cannot rejoin double. 4 Ann. c. 16.

Fisher *vers.* Hughes.

ERROR out of the grand sessions in *Wales* in ejectment, wherein the plaintiff declares, that *Robinson et ux'* demised to him one hundred acres of land, and that afterwards the same day *Egerton et ux'* demised to him *premissa præd'*. Upon Not guilty pleaded, the jury find for the plaintiff *quoad* the lands demised by *Robinson et ux'*: *et quoad tenementa præd'* which *Egerton et ux'* demised, they find for the defendants. And the judgment is entered, that the plaintiff shall recover his term in the tenements demised by *Robinson et ux'*: *et quoad cætera præmissa sit in misericordia pro falso clamore versus defendantem pro præd' tenementis*, which *Egerton et ux'* demised: *et præd' defendens sit quietus, et sat inde sine die, &c.*

How to lay the second demise in ejectment. 1 Barn. B. R. 464. 2 Barn. B. R. 10.

Strange pro quer' in errore objected, that for want of pursuing the common form in laying the second demise to be *aliorum tenementorum*, the judgments here given are contradictory to each other: the defendant is put without day as to the same premises, for which the plaintiff recovers.

Et per curiam, This is certainly far from being a correct entry; but we will not reverse it, if it be possible to support it: we will construe *tenementa prad' qua Egerton et ux'* demised, to mean the term in the premises, and then it will be well enough (1). The judgment was affirmed.

(1) *Vide Worrall v. Bent*, ante 835. *Morris v. Barry*, post. 1180.

Dunn vers. Vacher et ux'.

Pleading double.

DEBT upon a bond entered into by the defendant's wife *dum sola*, conditioned that she should, within ten days after the plaintiff's return from his voyage marry him if requested. And *Strange* moved, and had leave to plead, *non est factum*, and that the plaintiff did never request her (1).

(1) *Vide note to Baker v. Westbrooke*, post. 949.

[909]

Willing vers. Goad.

Gaoler cannot retake for his fees.

2 Barn. B. R., 30. S. C.

SERJEANT *Birch* moved to discharge the defendant out of the custody of the marshal, the plaintiff in the action having sent an order for his discharge. Upon a rule to shew cause, the marshal insisted, that the defendant had broke the prison, and let out himself and another prisoner, who was in execution for 500 l. and that though the plaintiff's discharge came whilst he was out of prison; yet he had since re-taken him for his fees, and had charged him in custody with a declaration for the escape of the other. But there being no case to warrant the gaoler's retaking for fees, and the plaintiff in the action being satisfied; the court held the re-taking to be illegal, and consequently the delivery of the declaration to him was void, and the marshal ought to discharge him.

King vers. Morris.

1 Barn. B. R., 20. S. C.

Variance in the evidence from the declaration. *Fitzg.* 298. better reported.

3 Barnard. B. R., 364. 412. S. C.

ACTION against the high-bailiff of *Westminster* for a false return. And the declaration set forth, that the plaintiff recovered a judgment against *Alexander Urquhart*, on which he sued a *fieri facias*, and a warrant was made to the high-bailiff to levy so much, which the plaintiff recovered against the said *A. U.*

Upon

Upon the evidence, the warrant was to levy of the goods and chattels of *A. U.* so much, *quas* the plaintiff *recuperavit versur* ... (omitting the name;) and the question reserved on the trial was, whether this was a variance. And the court on debate held it none, the *feri facias* being right; and they said they would take that and the warrant as the same proceeding (1). So the plaintiff had judgment.

(1) The grounds of the judgment as given more clearly in *Fitzg.* are, "That as the variance did not contradict the record, so neither did it cause a failure in proof, for the obvious construction of the warrant is, that the recovery was had against him whose goods are thereby directed to be taken in execution, and they held that though the case had stood singly upon this point,

the evidence maintained the declaration. But Lord Raymond observed, that the *fi. fa.* which issued on the judgment against *A. U.* was given in evidence, and then the warrant being laid in the declaration to have issued *super inde (viz. the fi. fa.)* may be understood to be in pursuance of it. So that by reference to that the name must be supplied.

Dominus Rex vers. Hudson.

At Guildhall, coram Raymond Chief Justice.

ON an information for stopping up a common foot-way, the prosecutor proved, that it had been a common passage under the defendant's house as far back as any witnesses could remember. But the defendant producing a lease made for fifty-six years of this way, to the intent it might be a passage during the term, and the term expiring in 1728; the Chief Justice held the defendant not guilty: and as to the leaving it open since, he said that would not be long enough to amount to a gift of it to the publick.

Where the original of a way is accounted for, the prescription is destroyed.

Lowfield vers. Bancroft & al'. Ibid.

[910]

IN an action for a malicious prosecution, the jury would have found 800*l.* damages against one defendant, and 100*l.* against each of the others. But the Chief Justice saying it could not be done, the jury gave a general verdict for 1100*l.* (1).

The damages cannot be given separately against several defendants.

(1) *Vide Lane v. Santelos, ante 79. contra.*

Hoar *vers.* Dacosta. Ibid.

Within what time a goldsmith's note must be demanded.

WOODWARD's note was paid to the plaintiff at twelve on the *Friday*, who put it into the bank at one, and the next morning at ten, the runner of the bank carried it to the shop with other notes to the value of 2600 *l.* and left them (as usual) to call again for the money; he called at eleven, and they said their servant was gone to the bank. He called again at two, and they said, they were going to shut up, and refused to pay; but paid small notes for two hours, and then stopt. And the next morning notice was given to the defendant, who had paid the note to the plaintiff. And now in an action for the money, the question was, whether this was payment to the plaintiff. It was insisted for the defendant, that he should not suffer by the plaintiff's paying it into the bank, who sent it with other notes; whereas if the note had been tendred by itself, it would have been paid. *E contra* it was insisted, that if there had been no demand, there would have been no laches, being within a day after the receipt, that the goldsmith stopt payment. The Chief Justice said there was no standing rule, but left it to the jury, who found for the plaintiff to the value of the note (1).

(1) *Vide ante* 415, 416. 508. 550. 707. *Post.* 1175. 1248.

Harris *vers.* Benson. Ibid.

Interest, when to be allowed.

IN an action against the drawer of an inland bill after acceptance, the Chief Justice ruled, that for want of a protest according to 9 & 10 *W. 3. c. 17.* the drawer could not be charged with interest. Then the plaintiff would have had it as for money lent, and that appeared to be the consideration of the bill; but the Chief Justice said, it had never been allowed barely for money lent, without a note; so the plaintiff had no interest allowed him. *Strange pro def.* (1).

(1) *Vide Brough v. Perkins*, 2 necessary to recover interest and *L. Raym.* 992. *Salk.* 131. *S. C.* expences. *Vide 3 & 4 Ann. c. 9.* but the bill must be above the *l.* 5. value of 20 *l.* to make a protest

Dominus Rex *vers.* Clendon.

AN information was laid for an assault in *Middlesex*, and the court refused to amend it by laying it in *London*.

Amendment.
2 Barn. B. R. 6.
S. C. by which
been withdrawn.

it appears that this motion was made after the record had gone down for trial and had

Dominus Rex *vers.* Dalton.

THE defendant had the misfortune to kill his schoolfellow at *Eton*. And being brought up by *habeas corpus* to the Chief Justice's house; it was returned, that he was committed by the coroner for manslaughter. It was therefore prayed he might be bailed. But the Chief Justice said, that was no reason, for if the depositions made it murder, he would not bail: *contra*, if they amounted only to manslaughter, he would bail, though the coroner's inquest had found it murder (1). And he said the distinction was between the coroner's inquest, where the court can look into the depositions; and an indictment, where the evidence is secret. That Lord *Mobun's* case in *Salk.* 104. was in point (though that was at *Holt's* chamber, and not in court as the book reports it) and that the lords bailed him after an indictment for murder was found. He said that himself refused to bail Mr. *Clifton*, because he thought the depositions made it murder, though the inquest was manslaughter only.

One found guilty
of manslaughter
by coroner's in-
quest is bailable.
Post. 1242.

The bail were four in 4000 *l.* The Chief Justice said, it had been usual to take them in a sum, or body for body; and that where they are taken *corpus pro corpore*, it was a mistake to imagine the bail were to be hanged if the principal ran away: but that the method is to amerce them.

Ante 855.
1 H. H. P. C.
125.
2 Hawk. P. C.
c. 15. l. 83.
177.
Crompt. Just.
157. a.

(1) *Rex v. —*, *Hil.* 12 Geo. "not the inquisition were to guide the
3. B. R. It was held by Lord "discretion of the court." MSS.
"Mansfield, that the depositions and

Harrison *vers.* Weldon.

Walker Weldon died intestate, leaving *Anne* his wife and *Amphillis* his sister: the sister upon the common oath, that she believed he died intestate without wife or children, obtained administration. And in a suit to repeal it as obtained by surprize, it appeared to be the course of the court, never to grant it to the next of kin, until the wife is cited.

The spiritual
court may re-
voke an admi-
nistration if ob-
tained by sur-
prize (1)
Fitzg. 303. S.C.
more full.

(1) *Vide* 4 Burn's *Eccle. Law* 36. 1 Com. Dig. Administrator 375. 6 Com. Dig. Pro-
Vol. II. hibition (G. 18.) 137. 2 Bac. Abr. Execution 410.

93.
S.C.

The sifter moved for a prohibition, and insisted that the ordinary had executed his authority, and cited 1 Sid. 179, 370, 1 Lev. 186.

3 Co. 78. b.
Salk. 36. 1 Lev.
305. 1 Keb.
123, 131.

But the court held, that the ordinary could not be said to have executed the authority, having never had an opportunity to make the election which the statute 21 H. 8. c. 5. gives him: that it was incident to every court, to rectify mistakes they were led into by the misrepresentation of the parties that if there was no surprize, (of which the court below was judge) there ought to be a prohibition, because then the administration will have been duly and regularly granted: but here was a plain surprize (2) and therefore they denied a prohibition.

(2) In *Fitz.* it is said that the administration granted to the sifter affidavits stated that the widow by fraud. was prevented from opposing the

Bentley *vers.* Episc' Eliensf.

Offences against the private statutes of a college are not pardoned by the act of grace. *Fitzg.* 107, 305. *Viner* vol. 17. p. 155. c. 13. 1 Barn. B. R. 192, 388, 451. 2 Barn. B. R. 9. S. C. *Fort.* 298. A copy of the present report. 4 Bro. P. C. with the proceedings before the visitor, the statutes and articles.

IN prohibition the plaintiff declared, that King Henry 8, 19 December, 13th year of his reign founded Trinity College in Cambridge, and that his successor Queen Elizabeth made a body of statutes, the fortieth whereof is intitled 'De magistris si res exigat amotione;' and speaking of the bishop of Ely, there are the words 'corrigat, puniat, expellat:' that he was cited to appear before the bishop as special visitor appointed by the said fortieth statute of Elizabeth, to answer to sixty-four articles, which are insisted upon as violations of the statutes, some of which are long before the last act of grace, and others of them are for setting the college seal in conjunction with the fellows. The bishop for a consultation sets out a former statute of Edward 6. in these words: 'visitator episcopus Eliensis sit,' and avers that he is a visitor general, and as such has a right to proceed upon the articles. The doctor put in an immaterial replication, to which there was a demurrer. And after several arguments these points were ruled.

First, that though several of the facts charged appear to be before the act of grace; yet they are not pardoned by that statute, but are still inquirable by the visitor. There are two sorts of corporations, first, those that are for publick government, and secondly, those that are for private charities. The first of these are governed by the common law, but the second is the creature of the founder, and governed by his private laws. Not that

that the particular persons are exempted from the common law, but the body in general is: and as these are private laws, they are in the nature of trusts, and the breach of them is no crime cognizable by the common law. The King's power of pardoning arises from his having the executive power in him; and though in this case the King is founder, yet the breach of his private statutes are not crimes against the crown. The crimes pardoned are such as are against the public laws and statutes of the realm, whereas these are in the nature of domestick rules for the better ordering of a private family.

[913]

Secondly, that though several of the crimes imputed to him for violations of the statutes of the college appear to be done by him in conjunction with others, yet that is no reason to exclude the inquiry of the visitor. Suppose the whole body should join in setting the seal to a deed to encourage a murder, would they not be severally punishable in their natural capacity? if he was not concurring in the act, and it is only as to him a virtual consent as included in the body; that will be proper matter of excuse. If a power is lodged in two or three justices, and they abuse it; are they not severally punishable for it? their being corporate acts therefore is no ground for a prohibition.

The visitor may punish one man for an act done by him jointly with others.

Thirdly, that by the statute of *Edward 6.* the bishop of *Ely* and his successors are appointed general visitors, it being *ep'us Eliensis* without any christian name, according to the case 15 *H. 7. i. b.* powers in acts of parliament given to bishops or justices will vest in their successors, without the words *for the time being*.

The appointment of a bishop without his christian name to be visitor extends to his successors.

Fourthly, that though the three former determinations are in favour of the suit below, yet the prohibition ought to stand; because the bishop has not cited the doctor upon the foot of his general visitatorial power, but as a special visitor appointed by the fortieth statute of *Elizabeth*, which the court said, he was not. For being before appointed general visitor, there remained no father power in the crown with regard to enlarging the visitatorial power (1). They said it was a question they would not determine, whether when the crown has given statutes and appointed a visitor, the successor can any way alter or annul the former statutes (2): the practice indeed has been otherwise; but it

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create him a visitor, but supposed him so already.

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Trinity Term 5 Geo. 2.

it had never been determined to be good. For this last reason they were all of opinion, that the prohibition ought to stand.

N. B. Upon a writ of error in parliament this judgment was reversed, and the lords went into the consideration of the several articles, and as to some granted a prohibition, and as to others a consultation.

gibbon makes Lord *Raymond* go on to say, "that where there is not a concurrence of all parties new statutes cannot by law bind them (*i. e.* University or other corporations) or repeal the old ones: however, I would not be thought to mean that even that concurrence would make the second good." And in the report of the *Master, &c. of St. John's College, Cambridge*, and *Todding-ton, Burn's Eccl. Law. title College*, 439. 1 *Black. Rep.* 84. S. C. Lord *Mansfield* declares that the first

point of what is said in *Fitzg.* to be Lord *Raymond's* opinion, was so determined in the present case. See also the opinion of Lord *Mansfield, Rex v. Vice Chancellor, &c. of Cambridge*, 3 *Burr.* 1636. As to the interference of common law courts where there is a visitor, *vide* the cases cited *Rex v. Chancellor, &c. of Cambridge*, ante 564. and the note, to which may added *Rex v. Bishop of Ex.* And. 176. *Rex v. Bishop of Ex.* 1 *Black. Rep.* 52.

Michaelmas Term

5 Georgii 2 Regis. In B. R.

Robert Lord Raymond, *Lord Chief Justice.*

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.* } *Justices.*

William Lee, *Esq;*

Sir Philip Yorke, *Knt. Attorney General.*

Charles Talbot, *Esq; Solicitor General.*

Martin vers. Davis.

IN ejectment, the court denied to let the parson of *Hampstead* chapel defend only for a right to enter and perform divine service, notwithstanding the case in *Salk.* 256. saying it had been often denied since.

No rule to defend *quoad* a right to perform divine service.
2 Barn. B. R.
27. S. C.

Bullock vers. Lincoln.

THE *latitat* was returnable on the *Wednesday*; and upon debate it was held, that the bail bond could not be assigned until after *Monday*, for the four days are to be one inclusive and the other exclusive; and where the fourth day is *Sunday*, the party has all the next day to put in bail. *Strange pro quer.*

Practice, on assigning bail bonds.
4 Ann. c. 16.
Ante 36, 782.

Dominus Rex *vers.* Heber.

Practice.
Barn. B. R. 77,
101. S. C. but
not S. P.

THE court would not hear a motion against a justice for convicting without summons, until the conviction was removed before them (1). *Strange pro rege.*

(1) S. P. *Per Aston J.* in *Creepes v. Durdan*, *Cowp.* 645.

Hoare *vers.* Mingay un', &c.

If an action is commenced against bail by a wrong process, it does not prevent his rendering the principal.

IN *Easter* term last the plaintiff brought his action in *C. B.* against the defendant on a recognizance of bail, but the defendant appearing to be an attorney of *B. R.* the plaintiff was forced to desist: on 20th *October* last the defendant surrendered the principal; and the first day of this term a bill was filed. And upon the defendant's motion to stay the proceedings, as having rendered the principal before action brought; the question was, whether the proceedings in *C. B.* were to be regarded; for if they were, the render would be too late. And the court held the render to be good, it being before the return of the process in this suit; and it was the fault of the plaintiff not to begin right at first. *Strange pro quer'.*

Dominus Rex *vers.* Wright.

Practice on Habeas corpus.

Return to habeas corpus.
Vide And. 282.
2 *Will.* 154.
40.

UPON a *habeas corpus* to him, to bring up a person under his care for lunacy, he made no return, and *Ketelbey* on an affidavit that the writ was delivered to him, moved for an attachment. The clerks of the crown-office certified, there ought first to be a rule to return the writ. *Sed per curiam*, In cases where the liberty of the subject is concerned, there ought to be no such indulgence, but all the expedition possible; and they granted an attachment *nisi*, &c. (1) whereupon the doctor came in and returned, that before the delivery of the writ he had delivered the woman to her husband, and that he does not know where she is, nor can produce her. And the court held it a sufficient answer.

(1) *Vide Rex v. Earl Ferrers*, 1 *Burr.* 631.

Astley *vers.* Reynolds.

IN an action for money had and received to the plaintiff's use, the case reserved for the consideration of the court was, that above three years ago, the plaintiff pawned plate to the defendant for 20 *l.* and at the three years end came to redeem it, and the defendant insisted to have 10 *l.* for the interest of it, and the plaintiff tendred him 4 *l.* knowing 4 *l.* to be more than legal interest. That the defendant refusing to take it, they parted; and at some months distance, the plaintiff came and made a second tender of the 4 *l.* but the defendant still insisting upon 10 *l.* the plaintiff paid it and had his goods: and now brings this action for the surplus beyond legal interest.

Where money is extorted by duress of goods *assumpsit* will lie for it (1).
2 Barn. B. R. 40.

[916]

For the plaintiff it was insisted by *Reeve*, *Filmer*, and *Draper*, that the action lay, the plaintiff not being *particeps criminis*, and having paid the money, not upon the foot of an usurious contract, but by compulsion. They agreed the case in *Salk.* 22. that if he had been party to the fraud, he could not maintain the action: but here they said the money was extorted; and extortion and usury differ in this, that one is given freely, and the other involuntarily, and a man shall avoid a deed by duress of his goods as well as of his person. 1 *Roll. Abr.* 687. And it is observable, that all the laws against usury are for the punishment of the lender, and not of the borrower; and that it is not pretended that there was any agreement about the interest at the time of the loan. And a case was cited of *Wilkinson v. Kitchen*, *Skinner* 412. *Trin.* 8 *W.* 3. where money was given to a *Newgate* solicitor, to lay out in bribes; and it was held by *Holt* Chief Justice, that it might be recovered back from him in an *indebitatus assumpsit*, though it appeared he had disposed of it according to his directions.

Skinner 412.
1 *Raym.* 29.

Contra, it was argued by *Marsb* and *Fazakerley*, that there was no colour to say the plaintiff paid it either by mistake or force, it being stated that he knew the 4 *l.* he tendred was beyond the legal interest; and he did it with his eyes open, having another remedy for his goods by trover after tender of the legal interest; and it falls within the rule *volenti non fit injuria*.

Et per curiam, The cases of payments by mistake or deceit, are not to be disputed; but this case is neither, for the plaintiff

Tender of more than legal interest is good.

(1) *Vide Dutch v. Warren*, ante 406. and the cases cited in the

knew what he did, in that lies the strength of the objection: but we do not think the tender of the 4*l.* will hurt him, for a man may tender too much, though a tender of too little is bad; and where a man does not know exactly what is due, he must at his peril take care to tender enough. We think also, that this is a payment by compulsion; the plaintiff might have such an immediate want of his goods, that an action of trover would not do his business: where the rule *volenti non fit injuria* is applied, it must be where the party had his freedom of exercising his will, which this man had not: we must take it he paid the money relying on his legal remedy to get it back again.

Where defendant dies pending time of argument or consideration of the court, judgment entered *nunc pro tunc*.
(a) 11 Mod. 201.

*The plaintiff had judgment; and the defendant dying pending the argument, judgment was ordered to be entered *nunc pro tunc* (2).

[*917]

In this case was cited *Sumner v. Ferryman* (a). Hil. 1708 wherein it was said to be held, that a bond could not be avoided by duress of goods, contrary to the case cited out of *Roll. Abr.*

non constat

(2) *Vide Isley's case* 1 Leon. 187. *lander*, cited *ib.* *Tooker v. Datch* 87. *Crispe and Jackson v. of Beaufort*, 1 Burr. 146. *Sir J. Mayor of Berwick*, 1 Sid. 462. *Trelawney v. Bishop of Winchester* 58, 190. *Cumber v. Waine*, *ib.* 226. in B. R. and *Croves ante 427. Taylor v. Matthews*, *Hanley, Barnes* 255. S. P. 10 Mod. 325. and *Baller v. De C. B.*

Dominus Rex vers. Barnes.

Commitment till he gives security to observe university statutes for life ill.
3 Hawk. P. C. c. 16. l. 18, 186.
4 Vom. Dig. Imprisonment. (H. 7.) 373.

THE defendant being brought up on a *habeas corpus*, appeared to be committed by the vice-chancellor of Oxford for carrying goods between Oxford and London without a university licence, there to remain until he gives security to carry more, and to observe the statutes of the university for life. *per curiam*, It is an illegal commitment, and he must be discharged.

Marshal vers. Cope.

Prolicer.
in B. R.
98. S. C.

THE rule to assign errors was set aside, because given before any rule on the *scire facias quare executio non* (1).

(1) But they may be served together. *Cambridge v. Haughey*, 11 R. p. 17.

Loving *vers.* Avery.

UPON my motion it was held, that there is no certain number of days necessary to be between the *teste* and return of a special *latitat*, and that even one day is sufficient, if it can be served.

Practice.
2 Barn. B. R.
60. S. C.
Tidd's Prac.
K. B. 93.

Woollaston *vers.* Walker.

THE declaration ran, *M. Walker attach' fuit ad respondendum Israeli Woollaston administratori bonorum et cattallorum qua fuerunt Nathanielis Clarke tempore mortis sue per Francisce Clarke nuper executricem testamenti prae'd' Nathanielis non administratorum durante quadam lite pendente coram Johanne Betworth L. L. D. curia prerogativa Willielmi Archiepiscopi Cantuariensis commissario in quodam negotio probationis per testes testamenti ultima voluntatis in scriptis prae'd' Francisce Clarke quod coram J. B. in judicio inter prae'd' J. W. executorem in eodem testamento nominatum partem hujusmodi negotium promoventem ex una parte et Margaretam Periam uxorem Edwardi Periam Janem Ramsay et Jemimam Lodington sorores naturales et legitimas dictae Francisce et Rogerum Israelem et Elizabetham Rant nepotem et item ex sorore dictae Francisce partes contra quas idem negotium movetur ex altera parte, de placito transgressionis super casum,* and concludes with an averment, that the suit is still depending.

An administrator pendente lite about a will may bring actions.
2 Will. Rep. 576.
Fitzg. 202, 257.
1 Barn. B. R. 423, 467.
2 Barn. B. R. 14, 62.
2 Bac. Abr. 415. S. C.

[918]

After judgment for the plaintiff in C. B. it came up by error B. R. and was there argued three times, whether such an administration could be granted; and if it could, whether the administrator could maintain an action.

They who argued against the administration insisted, that it was not warranted by the 31 Ed. 3. and that though it had preceded in the case of a contest for administration, where there is no will; yet in the case of a will it had never been allowed; because a will is a total deprivation of their jurisdiction to grant administration. And there are but two ways of dying intestate; 1. Where no will is made. 2. Where the executors refuse; either of which appears to be the present case. And *Carth.* was cited. *Mo.* 636.

Contra, it was argued, that though this is not within the words of 31 Ed. 3. yet many administrations are now granted, which

which obtained from necessity; as in the cases of minority, or absence of the executor, in which case it is not disputed, but that there is a will, which is doubtful in the present case. *Ow.* 35. 5 *Co.* 29. *Hob.* 251. 1 *Roll. Abr.* 888. 2 *Brownl.* 83. *Lutw.* 342. 4 *Mod.* 14. *Salk.* 42. *Gibf. Cod.* 574. And as to the case in *Carthew*, it was never adjudged.

2 *Jon.* 134.
3 *Show.* 69.

Et per curiam, We can see no difference in the cases of absence or minority, but what makes in favour of the present administration: it would be very inconvenient if no body could call in the effects, pending the dispute, which often lasts many years. We cannot say this administration is void, because it is not determined yet, whether there is a will or not (1). The judgment of *C. B.* was affirmed.

(1) *S. P.* considered by Lord in *Wills v. Rich*, 2 *Atk.* 285. *Hardwicke* as settled by this case *Knight v. Duplass*, 1 *Vex.* 325.

Dominus Rex vers. Baxter.

Informations are local.

(a) *Rep.* 1 *Seff.*
2 *Barn. B. R.*
Ca. 246. c. 196.

UPON motion for an information the court refused to grant it, because it appeared that the facts were committed upon the high seas, and an information is local. 3 *Keb.* 603. 799. *Salk.* 174. *Kelyng* 79. *Hil.* 7 *Geo.* 2. *Rex v. Hooper*, (a) information denied, for a battery in *Newfoundland*.

[919]

Skinner vers. Rebow.

To a declaration on promise to the assignee, *non assumpsit* to the bankrupt is an ill plea.
2 *Barn. B. R.*
73. *S. C.*

IN an action by the plaintiff as assignee of the effects of a bankrupt, he declared that the defendant was indebted to the bankrupt, and being so indebted promised the plaintiff to pay. The defendant pleaded that the cause of action did not accrue to the bankrupt within six years. And on demurrer it was held ill, because the plea does not answer to the promise laid in the declaration, and it precludes the plaintiff from proving any promise to himself. 6 *Mod.* 131, 309. *Salk.* 28. *Judicium pro quer.*

Dominus Rex *vers.* Theed.

A Conviction on the candle act was quashed, because the evidence was not set out, it being only alleged that the offence was fully and duly proved (1). *L. Raym.* 1375. *Ante* 608.

In convictions the evidence must be set out.
1 Sess. Ca. p.
417. no. 331.
2 Barn. B. R.
329. S. C.

16, 73. And 24. n. 3 Mod.

(1) *Rex v. Loyd*, *post.* 999. *let*, 4 *Burr.* 2063. *Rex v. Read*, *Rex v. Bryan*, *And.* 81. *Rex v. Doug.* 486. *Rex v. Thompson*, *Vigant*, 2 *Burr.* 1163. *Rex v. Kil-* 2 *Term Rep.* 18.

The South-sea Company *vers.* Duncomb.

UPON a trial at bar in an action for money lent, it appeared that 8000 *l.* was advanced to the defendant by the plaintiffs in the year 1720. upon a pawn of 2000 *l.* stock. And the defendant not repaying it, the question to be tried was, whether the plaintiffs could proceed against the person of the defendant, or must stand to the remedy against the stock. And after proof of many particulars, to induce a belief that in these loans no regard was had to the personal security; the court left it to the jury upon this point, that where money is generally lent upon a pledge, it will not deprive the lender of his remedy against the person; and that to discharge the person of the borrower, there must be a special agreement to stand to the pledge only. And the jury found for the defendant. *Strange pro def.*

Where money is lent on a pledge the borrower is liable, without there is an agreement to the contrary.
2 Barn. B. R.
48. S. C. more fully;
Cro. Jac. 281.
2 *Lev.* 116.
2 *Keb.* 460.
Yelv. 179.
Salk. 523.
3 *Will. Rep.* 360.
Abr. Ca. Eq. 139.

Benson vers. Olive.

[920]

In Scaccario, coram Reynolds C. B.

UPON trial of an issue directed by the court of Exchequer, the deposition of a witness examined in 1672. was offered to be read, without any evidence of his being dead, relying on the presumption from length of time, which would intitle the reading a deed of that date. The Chief Baron refused to let it be read, saying a deed had some authenticity from the solemnity of hand and seal: he said if proper searches or inquiry

Cannot read deposition of a witness examined fifty years before, without some account of his death.

Michaelmas Term 5 Geo. 2.

had been made, and no account could be given of him; he would have admitted it at such a distance of time (1).

(1) In a cause with the same 248. this is represented as the name. *Rep.* 1 *Barr.* 348. *Bunb.* case of a deed, but *quære* if S. C.

Dominus Rex vers. Lone.

Indictment lies for not taking the office of constable.

Fitzg. 192.
2 *Sess. Ca. p.*
408. no. 326.
Cases of Set. and Rem. p. 210.
no. 234.
1 *Barr. B. R.*
413. S. C.
Vide 11 *Mod.*
215.

2 *Hawk. P. C.*
c. 10. f. 46. p.
303. S. P. and
Doubt. 531.
where in a litigated case this exception was not taken.

THE indictment set forth, that at a wardmote held according to the custom of the city of London for the ward of Langborn, the defendant being an inhabitant and paying foot and lot, was chosen constable, but had refused to execute the office. After verdict *pro rege* it was moved in arrest of judgment, that this was not an offence indictable, but the proper remedy was for the steward to fine him, and *Regina v. Dasey*, 11 *Ann.* *Salk.* 175. were cited.

E contra it was insisted, that they might proceed either way. 3 *Keb.* 197, 230. *Cro. Car.* 557. 1 *Sid.* 272. *Cumb.* 416. *Skinner* 669. and *Paf.* 8 *Ann.* *Regina v. Jennings*; which was an indictment for not taking the office of high constable. 5 *Mab.* 96. 1 *Vent.* 344. *Trem. Ent.* 221. *Et per curiam*, There is no express determination that it is ill, for *Dasey's* case had many other faults: this is an office concerning the publick justice; and if the party is absent, he cannot be fined; and it will be inconvenient to stay till the next court for a presentment of his refusal. And *Lee J.* said, he had seen a manuscript report of the case cited from *Salk.* 175. wherein *Holt. C. J.* says, the party may be indicted. *Judicium pro rege. Strange pro def.*

[921]

Dominus Rex vers. Philips et al.

Cannot join several in one indictment for perjury (1).
2 *Barr. B. R.*
80. S. C.

SIX persons were indicted in one indictment for perjury, and four of them pleading were convicted. It was then moved in arrest of judgment, that crimes (especially perjury) were in their nature several, and two cannot be indicted together. *And Palm.* 535. 6 *Mod.* 210. 2 *Roll. Abr.* 81. pl. 6, 7. *Salk.* 382. *Paf.* 11 *Geo.* 1. *Rex v. Weston et al.*, ante 623. *Trem.* 4 *Geo.* 2. *Rex v. Clendon*, ante 870. 1 *Keb.* 585, 612, 635 were cited.

(1) 2 *Hawk. H. P. C. ch.* 25. *sect.* 89. p. 342. *Rex v. Phillips and Saunders*, 2 *Burr.* 984.

Michaelmas Term 5 Geo. 2.

Ex contra were cited *Salk.* 382. in extortion, *Trin.* 10 *Ann.* *Regina v. Marshall* against two for receiving stolen goods. 1 *Vent.* 302. 3 *Keb.* 700. for maintenance. 2 *Roll. Rep.* 345. *Palm.* 367. *Salk.* 384. against husband and wife for keeping a disorderly house, and *Regina v. Dixon et ux.* *Sti.* 312. *Cro.* *El.* 230. 3 *Leon.* 230, where this exception was not taken in perjury. *Cro. Car.* 380.

Sed per curiam, There may be great inconveniences if this is allowed: one may be desirous to have a *certiorari*, and the other not; the jury on the trial of all may apply evidence to all, that is but evidence against one. The cases cited are all of that which may be joint, as extortion, maintenance, &c. but perjury is a separate act in each: and *Trin.* 6 *Ann.* *Regina v. Hodson et al.*, two were indicted for being scolds, and compared to barrettry, and held not to lie. The judgment was arrested. *Strang pro def.*

Sir Francis Page, Knt.

Sir Edmund Popham, Knt.

William Lee, Esq.

Sir Philip Yorke, Knt. Attorney General.

Charles Talbot, Esq. Solicitor General.

Masters of the Bench.

Hilary Term

5 Georgii 2 Regis. In B. R.

Robert Lord Raymond, Lord Chief Justice,

Sir Francis Page, Knt.

Sir Edmund Probyn, Knt.

William Lee, Esq;

} Justices.

Sir Philip Yorke, Knt. Attorney General.

Charles Talbot, Esq; Solicitor General.

Martin *vers.* Moor.

Where the recovery is for more than the debt sworn to, the bail is liable only for that sum and the costs.

2 Barn. B. R.

44, 89. S. C.

Salk. 102.

6 Mod. 90, 267.

3 Keb. 16.

1 Lill. Pract.

Reg. 149.

2 Show. 183.

2 Show. 335.

THE *latitat* was with an *acetiam* for 80 *l.* and the declaration was *ad damnum* 150 *l.* and the verdict for 104 *l.* and there being variety of opinions in the books, whether the bail should be liable *pro tanto*, or totally discharged; and the question having been many terms depending in this cause, it came now to be finally settled. And the authorities contradicting one another, the court took it up on the reason of the thing; and resolved, that as on the one hand there was no colour to subject the bail to more than they were bound in, let the plaintiff's demand be ever so much more; so on the other hand there was no reason the plaintiff should suffer by his moderation in taking bail, but the recognizance should be considered as an agreement to pay 80 *l.* or deliver up the defendant. And therefore they made a rule, that the goods of the bail taken in execution should be re-delivered, on the bail's paying the 80 *l.* and the costs.

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costs (1), or else the goods to be sold and the surplus returned,
Strange pro quer.

(1) *Peterken v. Sampson, M.* the sheriff are liable to the extent
25 Geo. 3. *Tidd's Prac.* 131. *Doug.* of the penalty in the bail bond to
331. S. C. *Sheddon v. Carnes,* satisfy the whole debt and costs.
B. R. E. 29 Geo. 3. *ib. Jackson v. Mitchell v. Gibbons, C. B. 1 H,*
Haffel, Doug. 330. S. P. But bail to *Black.* 76.

Dilley vers. Polhill.

[923]

IN debt the plaintiff declared, that 7 *March* 3 *Geo. 2.*, the de-
fendant by bond submitted himself to the award of *James*
Pope, an arbitrator indifferently named and elected as well on the
part of the plaintiff as of the defendant, so as the award be made
in writing under hand and seal before 20 *April*. That 18 *April*,
Pope by writing under hand and seal, reciting that an action
had been brought by the plaintiff against the defendant for words,
therefore to end the dispute he awarded, that the defendant should
on 27th of *April*, between two and five in the afternoon, at the
Cock and Lion in *Dartford*, pay the plaintiff ten guineas for his
damages, and 6 *l.* 19 *s.* for costs; that the plaintiff should pay
the defendant 1 *s.* after which both should give mutual re-
leases.

In debt on an
award a mutual
submission must
be shewn.
1 Barn. B. R.
448.
2 Barn. B. R.
42, 55. S. C.
Vide 1 Com.
Dig. Arbitra-
ment (L. 2.) § 54.

The defendant demurred, and *Strange pro def.* argued, that
the plaintiff had not in his declaration shewn what was necessary
to maintain his action, for he has not shewn that there was any
submission on his part: and it is contrary, 1. to the nature of
an award, and 2. to the precedents.

1. An award is the determination of a third person between
two others, who submit to his judgment. These submissions
create a mutual obligation upon both, to acquiesce in his deci-
sion. It is therefore contrary to the nature of an award, that the
arbitrator should determine any thing with regard to one who
does not submit to his judgment; and in 1 *Roll. Rep.* 194. it is
resolved in *assumpsit*, that mutual promises shall bind, without
any other consideration.

1 Saund. 326.
Bro. Arbitr. 18.

2. The precedents are all contrary, and a strong evidence
what the law is. 2 *Saund.* 61, 127, 337. 1 *Saund.* 32. *Mo.*
359, 642. *Rast.* 153. b. *Co. Ent.* 159. a. *Old Ent.* 41. a.
64. a. *Tbo. Ent.* 107, 116. *Ashton's Precedents* 188, 200.
Litt. Rep. 312. 1 *Leon.* 72. 1 *Roll. Rep.* 5. *Brownl.* 181.
Regist. 111. a.

Hawkins

Hawkins Serjeant *contra* agreed, that a mutual submission was necessary to be shewn; but insisted that it is sufficiently averred, it being laid that the arbitrator was elected for both, and that in declarations it is enough for the plaintiff to shew what makes for him, according to 1 *Sid.* 161. *Litt. Rep.* 312.

[924]

[822]

Strange replied and observed that the averment is not that the arbitrator was nominated by, but on the behalf of the defendant, which might be done by a friend to whose nomination the defendant might not submit. And as to the case in 1 *Sid.* it is only said by the counsel, and agreed by *Twissden*, that if the plaintiff brings debt for money generally, without shewing the award to be of both parts, it is well enough; but not a word said about the submission. And as to *Litt.* 312. that is only that the plaintiff need not set out any more of the award than makes for him; but in that case it is averred, both submitted. And for want of it here it doth not appear that the defendant has any remedy for the *r. s.* or release awarded to him.

Et per curiam, There is a great deal of difference where the action is brought upon the bond of submission, and where it is upon the award; in the first case, the defendant by craving over shews that there were mutual submissions, the condition always so reciting it: but in the other case it must be averred, before you can properly introduce your award: on the behalf, does not import him to be named by the defendant: and in debt on the bond, *nul agard fait* admits a submission: we think therefore, that as a mutual submission is necessary to be shewn, there is nothing tantamount on this declaration. The plaintiff discontinued on payment of costs.

Cortijos vers. Munoz.

Addition of
"late of London
merchant" good,
though defend-
ant commorant
in *Middlesex*.
2 Barn. B R.
95.
Vide 1 Com.
Dig. Abatement
(F. 25.) 45.

THE defendant was sued by a special original with the addition of *nuper de London merchant*: the defendant pleaded, that for four years before he was commorant at *White-chapel* in *Middlesex*, and traversed that at the time of the writ *vel nuper tunc vel unquam postea* he was of *London*; and made affidavit that the contents of his plea were true, and *Theloa's Digest*, lib. 6. was cited in maintenance of it.

But upon motion (1) the plea was set aside, for by 1 *Hen. 5. c. 5.* the plaintiff has his election to name him of the place he was

(1) *Sed vide Shelly v. Wright*, in *C. R. Barnes* 338.

lately

lately commorant in, the words being *de villis et countis on illis fueront ou font*; and so is 19 Hen. 6. 1. Bro. Brief 174. *Strange pro quer?*

Inter paroch' St. Margaret's Westminster and St. Martin's Ludgate.

UPON a special order of sessions it was stated, that a Fleet prisoner took a house of 25 *l. per annum* within the rules, and lived in it eight years, and paid all taxes; and it was held he gained a settlement.

Poor.

1 Barn. B. R.

74.

2 Kely. 240.

2 Bot. by Const.

146. pl. 186.

S. C.

Pendrell *vers.* Pendrell.

[925]

UPON an issue out of Chancery to try, whether the plaintiff was the heir at law of one Thomas Pendrell, it was agreed, that the plaintiff's father and mother were married, and cohabited for some months; that they parted, she staying in London, and he going into *Staffordshire*; that at the end of three years the plaintiff was born. And there being some doubt upon the evidence, whether the husband had not been in London within the last year, it was sent to be tried. And the plaintiff rested at first upon the presumption of law in favour of legitimacy which was encountered by strong evidence of no access, And it was agreed by court and counsel on the trial at *Guildhall* before Lord Chief Justice Raymond, that the old doctrine of being within the four seas was not to take place; but the jury were at liberty to consider of the point of access, which they did, and found against the plaintiff (1).

Though the husband is in England, yet if no access can be proved the issue are bastards. Cited 3 Will. Rep. 275. L. N. P. 113, 294.

The Chief Justice allowed the defendant to prove the mother to be a woman of ill fame. *Salk.* 120. *Cro. Jac.* 541. But he would not allow the mother's declarations to be given in evidence, till she had been called, and denied them upon the cross examination (2). *Strange pro quer?*

(1) *Rex v. Inhabitants of Redal*, Tr. 11 Geo. 2. B. L. R. 112. *post.* 1976. *Lomax v. Holmden* at bar, *post.* 940. *Goodright v. Saul*, 4 Term Rep. 356. S. P. and that ancient authorities are not wanting to justify over-ruling the old doctrine. *Vide Harv. Co. Litt.* 126. a.

(2) Because the declarations of the wife without oath *for being alive*, cannot be given in evidence in chief even in a question of legitimacy, as they are not the best evidence; but after she had denied them upon cross examination they were admissible to impeach her credit. *Vide Bull. L. N. P.* 134. *ib.*

ib. 294. *Clark v. Wright*, cited *Caf. Temp. Hardw.* 80. Upon the question of a child's legitimacy the father or mother having no interest in the cause may be produced by either side to prove or disprove the fact and time of marriage. *Stapleton v. Stapleton*, *Caf. Temp. Hardw.* 277. *Lomax v. Lomax*, *Bull. L. N. P.* 287. Lord *Valentia's* case in *Dom. Proc.* 1771. cited *Cowp.* 593. *Sacheverell's* case *Bull. L. N. P.* 241. *May v. May*, *ib.* 112. *St. Peter's v. Old Swinford*, *ib.* 112. *Burr. S. C.* 25. *S. C.* So also to prove that the child was born prior or subsequent to a marriage had between the parents, their testimony, or after their death, evidence of their declarations is admissible. *Goodright ex dem. Stevens v. Moss*, *Cowp.* 591. But where the child is born in wedlock, the evidence or declarations of the parents seem inadmissible to bastardize such issue. Said by Lord *Mansfield* to have been solemnly determined by the delegates, *Cowp.* 594. *ib.*

592. *Rex v. Reading*, *Caf. Temp. Hardw.* 79. *Rex v. Rooke*, 1 *Wils.* 340. But in these last cases the evidence of the wife went to exonerate the husband from the maintenance of the bastard, and some stress is laid upon her being the sole witness. This rule however where the child appears to be born in wedlock has this exception, that the wife may be admitted to prove the fact of adultery from the necessity of the thing. *Rex v. Reading*, *Rex v. Rooke*, at *supra*. It is said in *Bull. L. N. P.* 287. that in an ejectment *Wright J.* admitted the father to prove the daughter legitimate. But as it is not stated whether the fact he was to prove was the time of marriage, &c. that case does not seem a direct authority that a parent may be admitted where it may be necessary to support the presumption of legitimacy arising from a child's being born in wedlock, although they cannot give evidence to bastardize it.

The Bishop of London *vers.* The Mercers Company

Of the effect of the union of parishes after the fire of London.

(1).

Fitzg. 169,

247.

1 *Barn. B. R.*

389, 439.

2 *Barn. B. R.*

64, 108, 145,

157, 170.

2 *Kely.* 215.

S. C.

ERROR of a judgment in *C. B.* in a *quare impedit* brought by the mercers company and *Edmund Lewen*, clerk, for the presentation to the parish church of *Saint Mildred Poultry* and *Saint Mary Colechurch* in the city of *London*.

The declaration set forth, that both churches were burnt down by the fire of *London*, and by the act for rebuilding the city it is provided, that the two parishes should be united, and the patrons to present by turns, and that which had the greatest endowment to present first; that *Saint Mildred Poultry* had the greatest; that the plaintiffs had the advowson of the rectory impropriate of *Saint Mary Colechurch*, and the crown the other, whose church was full of *Richard Perinchief*, clerk. That after

(1) *Vide Warden and Common- Canterbury*, 3 *Wils.* 214. 2 *Black.* alij *J. Grocers v. Archbishop of* 770. *S. C.*

the union King *Charles* the Second presented *Richard Perinchief*, Dr. in divinity, who died; and the King presented *John Williams*, who was instituted and inducted, and afterwards promoted to the see of *Chichester*, whereby it belonged to the King to present by his prerogative; and the crown thereupon presented *George Martin*, who was instituted and inducted, and died incumbent, and King *George* the First presented *Robert Breton*, who was instituted and inducted, and the church became void by his resignation; unde it belongs to the company to present, but the bishop and *Lewen* hinder them.

[926]

The bishop pleads that he claims nothing but as ordinary.

The incumbent pleads, that before the plaintiffs had any thing to do with the advowson, and before the act for rebuilding the city, the master and brothers of the hospital of *Saint Thomas of Acon* were seised in fee in right of their house of the rectory and church of *Saint Mary Colechurch*, which were annexed to the hospital, and were held by them as parsons, without any presentation or admission. That upon the dissolution of the house it came to King *Henry* the Eighth in the same condition, who became seised thereof in right of his crown, and 21 April 33d of his reign, by letters patent under the great seal granted the said rectory to the mercers company, to hold *in capite* by the twentieth part of a knight's fee, and a stipend for a chaplain, and that they should hold in as ample a manner as the hospital did. That King *Charles* the Second was seised in right of his crown of the advowson of *Saint Mildred Poultry*, and presented *Richard Perinchief*, who was instituted and inducted, and that the mercers company enjoyed *Saint Mary Colechurch* to their own use, without any presentation. That after the union *Perinchief* resigned, and was thereupon presented to both by the crown, and was instituted and inducted, and died incumbent, whereupon *Williams* was presented, instituted, inducted, and promoted to the see of *Chichester*, and the crown presented *Martin*, who was instituted and inducted, and died incumbent, and then *Breton* was presented by the crown, and instituted and inducted, and resigned, on which he says it belonged to the crown to present, who before the writ presented him; and traverses that at the time of the act for rebuilding, the mercers company were patrons of the rectory of *Saint Mary Colechurch*.

The plaintiffs take judgment on the bishop's plea, with a *cesset executio quousque*, &c. And as the incumbent's plea, they join issue upon the traverse; which is found for the plaintiffs, who have thereupon judgment to recover their presentation. And then goes out the writ to enquire of the value, plenarily,

narty, &c. And the inquisition finds, 1. The church to be vacant, 2. *Quod tempus semestre transiit*: and, 3. That the yearly value is 140 l. *ultra reprisas*: and there is judgment for 70 l. for a moiety of the annual value, and for a writ to the bishop. Whereupon a writ of error was brought, and the general errors assigned.

[927]

Révé pro quer' in errore argued, that there appeared no title for the company to recover this presentation. This depends in a great measure on the act for rebuilding the city, which is 22 Car. 2. c. 11. § 48. and provides, "That these two churches shall be united, and that the several and respective patrons of the churches so united shall and may present by turns to that church only which by the act is appointed to be rebuilt, the first presentment to be made by the patron of such of the said churches, the endowments whereof are of the greatest yearly value." In order therefore for the plaintiffs to intitle themselves to present, it is necessary for them to shew themselves to have been patrons of one of the united churches at the time of the union, which they have not done: on the contrary it appears, that this was an appropriate church, in which there was a perpetual incumbency; and the act only intending to preserve the former rights of patronage, cannot be set up as creating a new one; in short that this (though it may be hard) is a case not provided for by the act.

By a grant of the advowson of the rectory, the right of the impropiator would not pass. *Hob. 304. 1 Roll. Abr. 45.* What words therefore are there in the act, which give the company a right of advowson they could never pretend to before?

If it is said that the verdict by finding them patrons has put this matter out of doubt, I answer that the verdict is of no use, being inconsistent with the case made upon record; and wherever the verdict is upon a point not material, the court is not bound to give judgment upon it. *2 Roll. Abr. 99. Carib. 370. Ante 873.*

But supposing they had a right to present as patrons, yet their judgment is ill. 1. Because they have not alleged any presentation in their count, which they ought to in *quare impedit*, which is a possessory action; and the precedents always are, that the plaintiffs, or those under whom they derive, have presented. *3 Lev. 435. Lev. Ent. 141.* 2. It appears upon the declaration, that this is not the turn of the company. Before the union the church was full of *Richard Perinchief*, clerk; and it not be-

ing

ing shewn that the church was became vacant when the crown presented *Richard Perinchief*, doctor in divinity, or that the doctor so presented was instituted and inducted, it will not go for the turn of the crown; and it is admitted the crown was to have the first turn.

The first turn then which the crown had was upon the presentation of *Williams*, after *Perinchief* died; and he being promoted to a bishoprick, the next turn was not an alternate one, but in right of the prerogative, and the company had no turn till after the death of *Martin*. The crown then usurped, and presented *Breton*, and now on his resignation it is the turn of the crown; and the company should either have brought their writ on the presentation of *Breton*, or have staid till there is a vacancy of the present incumbency.

[928]

I expect it will be said, that by the plea it appears, *Perinchief*, who was presented after the union, was instituted and inducted; and that though the variation in the addition between clerk and doctor in divinity excludes a presumption they were the same person, yet the last was a full turn.

In answer to this I observe, that the allegation referred to is only in the inducement to the traverse, which whether it be true or false is not material; and wherever matter of substance is omitted, it will not be made good by the plea. 7 Co. 24. 8 Co. 120, 133.

Strange contra argued, that upon the whole record the plaintiffs appear to have a right to present to this church; that the verdict was upon a material point, and is not inconsistent with the declaration: and that whether the plaintiffs are to be considered as impropiators, or as patrons of a donative, before the act; yet now upon the foot of the act this church is presentative, and the plaintiffs have a right to present to it.

To intitle themselves under the act, it was necessary to aver, that they were patrons at the time of making the act, which vests the right in the then patrons: to overthrow this, it was proper for the defendants to deny, that the plaintiffs were within the description of the act; and accordingly they traverse that part of the declaration, which avers them so to be; the issue is joined on this, and by the verdict of the jury, it is established, that the plaintiffs were the undoubted patrons at the time of the act.

Every impropiator or appropriator is a patron, for he is both patron and parson, and so is 2 Roll. Abr. 334. The verdict therefore

therefore cannot be said to be inconsistent with the declaration, wherein the plaintiffs allege themselves to be patrons.

It must be agreed, that before the act the plaintiffs had an interest in this church, and therefore the court will never give into so harsh a construction of the act, as totally to take away their right; it appearing on the contrary to be calculated for preserving the respective rights: it is hard enough to take from them the profits of the rectory, and but a small amends to give them the presentation.

[929] Now if they cannot present, their right is gone, and the patron of the other church will present upon every vacancy, and his presentee will be intitled to the profits of this church, either as curate under the plaintiffs who never appointed him; or as vicar, though no vicarage was ever created.

If this be considered as a donative, it cannot be disputed but that without the act it was in the power of the plaintiffs to make it presentative whenever they pleased. *Co. Litt.* 344. a. *F. N. B.* 35. and when they have once presented, it remains presentative ever after.

On the other hand, if this be considered as a rectory appropriate to a religious house, yet by such appropriation the advowson or right of patronage was not destroyed, but capable of being revived by a presentation to the church, or by the dissolution of the religious house. Here was a dissolution, and the crown in whom it vested granted it out again to the plaintiffs, who were lay persons; whereby I apprehend they were seised in fee of the rectory and church impropriate, and had the right of supplying the cure without institution or induction, which is making it a donative in them, and them the patrons: and as patrons of a donative no body will say they cannot present. The intent of the act was to put both churches on the same foot, and not leave one to be presentative and the other to be filled by donation, which must create confusion.

But whatever the right was before, yet by force of the word *present* in the act, that is now the only way by which this church can be filled; for *presentation*, is a term well known in law, and by force of that word only a donative has been changed into presentative. *Hill. 3 Geo. 1. Shirt v. Carr*, the church of *Michin* was a donative in the dean and chapter of *Dublin*, and by the act of parliament was divided into three parishes, and by the same act it was appointed that the right of patronage and presentation to the three churches should be in and belong to the

said dean and chapter, in such manner as the right of nomination or presentation to the old church was before, and no otherwise. The patrons continued to nominate their clerk, and it was held they had no right, for that the ancient method of filling the old church was destroyed, and a new one created by the act, viz. a right to present only. This was the opinion of the *King's Bench* in *Ireland*, affirmed here, and in the House of Lords.

But then it is objected, that a *quare impedit* is a possessory action, and the plaintiffs have shewn no presentation in themselves, or those under whom they claim. To this I answer, it appears impossible they should do so in this particular case, because the right of presentation commences but with the act, and it appears this is their first turn. In the *quare impedit* brought against Dr. Birch for the church of *St. James's*, the crown made title under the act which made that a new parish, and no presentation was alleged before; and if the bishop of *London*, or Lord *Jermyn*, had after the death of *Tenison* been put to bring their *quare impedit*: it would have been impossible for them to have alleged any presentation, it being the first turn after the act. Besides, this objection holds against ever making a donative presentative, for there must be a time when it shall begin to be so; and it is putting it in the election of the ordinary, whether the founder of the donative, or the person claiming under him, shall be allowed to make it presentative, which was never questioned.

[930]

And as to the objection that this is not the turn of the company, I agree that if it is to stand upon the declaration only, it is so; but as the court is to judge upon the whole record, and it appears *Perinchief's* presentation, as stated in the plea, will make a turn of the crown; we are intitled to pray in aid of it. As also of 7 *Ann. c. 13.* which provides 'that no usurpation shall displace the estate of a patron, or turn it to a right; but that notwithstanding he may maintain a *quare impedit* upon the next avoidance.' Here the crown usurped the last turn, and therefore we have a right to a *quare impedit* in this. Why is not this to be considered as a new created church; and if it is, it is not exactly the case of *St. James's* before cited? where the bishop of *London* and Lord *Jermyn* had alternate rights by act of parliament. And yet it was held to partake of all the nature of an old church, and that the King's prerogative should take place upon it, contrary to the strict letter of the act.

This does not so much depend upon the nature of the interest which the company had under the grant of *Henry 8.* before the act, as on the act for uniting the two churches. If they had it

as a donative before, they might present when they pleased, and maintain a *quare impedit* on the ordinary's refusal to admit. If they were impropriators by virtue of that grant, they were still patrons, and as such have their rights preserved, though new moulded, by the act for rebuilding the city, which has directed that for the future they shall exercise their right by presentation, and no otherwise.

[931]

Want of an averment in a declaration helped by pleading over.

The court made little difficulty of the case upon the merits, saying that an appropriation might create a right of patronage; and they could not take it to be contrary to the verdict, or put so hard a construction on the act as to take away the company's right, it being agreed on all hands that they could not use it as they did before: but as to the objection to its not being the company's turn, they thought it so considerable, as to appoint another argument on that only. And now this term the Chief Justice delivered the resolution of the court. That though it did not appear on the declaration to be the company's turn, for want of shewing that *Perinchief*, who was in before the fire, died or resigned, or that the other presented was the same person; yet upon the pleading over it was helped, for there are no negative words in the declaration, and since the statutes of jeofails, there have been cases that have gone as far as this. *Cro. Car.* 288. *Sir W. Jones* 307. In words, the defendant justified, and shewed the oath which the declaration did not, only generally that he was forsworn, which then was held not actionable, and judgment was affirmed, which could not be without praying in aid of the plea. 1 *Sid.* 184. It was not said to be the plaintiff's hoop; but there being a justification, it was held to be cured in so substantial a fault: and to the same purpose is *Lutw.* 1492. The judgment therefore was affirmed. And afterwards the company moved for damages to be assessed *occasione dilationis executionis*, on 3 *H. 7. c.* 10. and that the computation might be at the rate set on the inquiry for the value of the church, during the time they were kept out by the writ of error, and cited *Cro. Car.* 145, 173. *Dyer* 77. *Sed per curiam*, Though they are intitled to damages, yet they are not to compute them in that manner. For if the writ of error had not been brought, they would not have been intitled to the profits, but their presentee, and all the real damage they sustain is the being kept out of the 70 l. Let the master therefore compute legal interest for that, and add it to the costs: they said the cases in *Croke* were unreasonable, and had never been considered (1).

(1) *Vide Bodily v. Bellamy*, 2 *Burr.* 1097. *Wilford v. Davidson*, 4 *Burr.* 2128. *Zinck v. Langton*, *Doug.* 750. 3d. ed. n. [3] and see the distinctions taken and cases cited *ib.* [n. (a) 742.] and *Shepherd v. Macbeth* in *Cam. Sec.* 2 *H. Black.* 284.

Easter Term

5 Georgii 2. Regis. In B. R.

Robert Lord Raymond, *Lord Chief Justice.*

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

William Lee, *Esq;*

Sir Philip Yorke, *Knt. Attorney General.*

Charles Talbot, *Esq; Solicitor General.*

}

Justices.

Dominus Rex vers. Inhab. de Uttoxeter in Com' Stafford.*

UPON great debate, and search of precedents, it was held, that a *certiorari* would not lie to remove the poor's rate itself, the remedy being to appeal, or by action when a dis-

The poor's rate is not to be removed.
1 Bott by Conf.
351. pl. 247.

Cunn. 28. 1 Sefs. Ca. p. 150. no. 143. 1 Barn. B. R. 443. 2 Kely. 117. S. C.

* In the very short note of the case of the *King v. Inhabitants of Uttoxeter*, in 2 *Stra.* 932. the determination that in the allowance of rates the justices act only *ministerially* is not mentioned; it is well known that in Mr. Ford's MSS. in which the above determination is mentioned, a great many of the cases in *Strange* are reported at much greater length, and more completely than by that author. Mr. Douglas had an op-

portunity of perusing Ford's account of this case and several others; but although those who have the pleasure of knowing his son, know how ready he is to permit his friends to consult his father's valuable MSS. it is much to be wished that he may some time or other make it publick for the general benefit of the profession. See *Doug. Hist. Controv. Etc.* 142. note. *Note to the second edition.*

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trefs is taken, which will answer all the ends of justice in coming at an unequal rate; whereas if the rate itself should be required to be sent up, great inconveniences and delays would follow, and a case was cited *Mich. 10 Ann. Regina v. Inhab. de St. Mary the Virgin in Marlborough*, where it was so resolved (1).

(1) *Rex v. Justices of Shrewsbury*, post. 975. *Rex v. King*, 2 Term Rep. 235.

Throgmorton ex dimissis' Miller *vers.* Smith & al.

Where lessor is an infant security must be given for costs. 2 Barn. B. R. 140. 2 Kely. 65. S. C. (2) And the note. [*933]

THE lessor of the plaintiff being an infant, I moved that he might be obliged to name a good plaintiff, who might be answerable for costs, and cited *Noke v. Windham*, ante 694 (a). And upon searching for that rule, it appeared that the father of the infant entred into a rule to pay costs; accordingly in this case there was a rule to stay proceedings, until security given, and the last day of the term the infant's mother entred into the rule,

Hayes *vers.* Warren.

Assumpsit will not lie for a past consideration unless it was at the request of the party (1). 2 Barn. B. R. 55. 71. 140. 2 Kely. 117. S. C.

ERROR of a judgment in *C. B.* in an action upon the case upon several promises, and after judgment by default, and intire damages, it was objected, that the fourth count was for work and labour done by the plaintiff for the defendant, in consideration whereof he promised to pay. And it was objected, that this was a past consideration; and not being laid to be done at the request of the defendant, it could be no consideration to raise an *assumpsit*, and 1 Roll. Abr. 11. pl. 1. *Cro. El.* 442. 741. 3 Leon. 91. *Dyer* 272. were cited by *Hussey*.

Strange contra, cited 2 Leon. 111. 225. *Raym.* 260. *Hutt.* 84. where *assumpsits* have been maintained on a past consideration: and though formerly courts were strict, yet now they draw nearer to common sense. There was a time when *assumpsit pro bonis et mercimoniis* generally, would have been wondred at, and *Holt* used to say, he was a bold man that first ventured on them; but now they are every day's experience: and why should not gratitude be a good consideration? he further insisted, that this is not to be taken as a past consideration; because the work and

(1) *Vide Pillans & al' v. Van* denied to be law by *Wilmet J. Microp*, where the present case is 3 Burr. 1671.

promise

promise are both laid on the same day, and the law makes no fractions of a day, and cited *Latch.* 150. in point. He further insisted, that upon the whole it appeared to be at the request of the defendant, it being laid to be done for him, and that the plaintiff *proinde* deserved from the defendant so much, which he has not paid, *ad damnum* of the plaintiff, and cited *Latch.* 112. 274.

Sed per curiam, It does not appear that this work was for the benefit of the defendant, and we must take it to be a past consideration, being laid that *postea* he promised to pay: if this was after a verdict, we should think the inferences from the words *pro* and *meruit de def.* would be material; but the statutes of jeofails do not protect judgments by default against objections that are cured by a verdict at common law, but such as are remedied after a verdict by the statutes. The judgment of *C. B.* was reversed.

The effect of the statutes of jeofails as to judgments by default.

Lowfield vers. Bancroft & al. Ante 910.

[934]

AFTER verdict for the plaintiff in an action for a libel, the judgment was arrested, because it was not laid that the libel was of or concerning the plaintiff, and *Cro. Jac.* 126. was cited. *Strange pro quer.*

Judgment arrested, because libel not laid to be *de et concern* the plaintiff.

Lampen vers. Hatch.

IN an action for words, the jury on the writ of inquiry gave 10*s.* damages, and the costs were taxed at 13*l.* and a judgment to recover them. Upon error it was objected, that by 21 *Jac.* 1. c. 16. § 6 if the jury that inquire of the damages find under 40*s.* there shall be no more costs: and it was therefore prayed to be reversed as to the costs.

Upon writ of inquiry in an action for words, verdict for judgment for 10*s.* and judgment for it, and 13*l.* costs, it must be reversed *in toto.* a *Kely.* 61, 3.

Strange for the plaintiff in the action insisted on account of the smallness of the damages, that the judgment should be reversed *in toto*, it being a joint judgment, and not like the cases where no costs can be given, and there is a distinct judgment. And the court without any difficulty reversed the judgment *in toto* (1). Ante 188. 808.

(1) *Vide Rous v. Etherington*, 2 *Ld. Raym.* 879.

Dominus Rex *vers.* Smith.

The commitment must specify what gaol the party is sent to.

2 Burn. R. R. 133.

2 Hawk. P. C. last ed. ch. 16. § 13. 236.

HE came up from *Oxford* gaol on a *habeas corpus*, and appeared to be committed for want of sureties in an action in the vice-chancellor's court of injury and damage to the value of 1000*l.* and by warrant the beaules of the university were required to carry him to prison. And now on my motion he was discharged. First, because the warrant was not directed to any gaoler, but was only generally to carry him to prison; and secondly, because it did not appear the plaintiff had made any affidavit of a debt, without which the court below could not hold to bail.

Goodtitle *vers.* Petto.

On covenant to stand seised for love and affection, one named in the deed may aver himself a relation.

A covenant in consideration of love and affection to B. his wife to stand seised to the use of such persons as B. shall think fit to dispose to; B. d. spouses to one who is a stranger to the consideration, no use arises.

Fitzg. 299 is a report of the first argument only.

2 Barn. B. R. 70. 90. 142.

S. C.

3 Com. Dig. Covenant, (G. 5.) 277.

[935]

IN ejectment on the demise of *William Thornton*, a case was made for the opinion of the court. That *Angelo Burt* being seised in fee of the premises in question, in consideration of the love and affection he bore to *Anne* his wife, and for some provision in case she should survive him, and for settling the premises in the manner after mentioned, 20 June 1702, covenanted to stand seised to the use of him and his wife for their lives and the life of the survivor, *remainder to the issue of their two bodies, remainder to the use of such person or persons as his wife shall think fit to dispose to, and for want of such disposition to the use of the lessor of the plaintiff. That by indentures of lease and release, 13 & 14 April 1724, after the death of the covenantor without issue, *Anne* the wife conveyed the premises to her sister *Joan Smallpiece* and her heirs, reciting the power and her intention to dispose. That *Joan* by her will gave the premises to the defendant. That the lessor of the plaintiff was the nephew of the covenantor. And whether he or the defendant had the right was the question.

And two points were made in the case. 1. Whether any use can arise to the defendant, who is a stranger to the consideration: and 2. Whether if the defendant has no title, the lessor can be said to have any, as within the consideration.

As to the first point the court were all of opinion, that there was no title in the defendant. Had the limitation been to the wife in fee, there would have been no doubt but those claiming under her would have enjoyed. But as the express consideration is only for the support of the wife, and the appointment is not

to be for her benefit, but she has a naked power for the benefit of strangers only; those strangers can never claim under such a consideration, according to the case of *Thomlinson v. Dighton*, Salk. 239. (a) 4 Co. 176.

(a) Rep. also,
10 Mod. 31.
Com. Rep. 194.
1 P. Wms. 148.
2 Eq. Ca. Abr.
309. pl. 13.

As to the second point, they were all of opinion that the lessor of the plaintiff had a title. 1. Because he is named in the deed. 2. Because it is stated that he was nephew to the covenantor. And though the deed does not mention him as such, yet being expressly named, he may aver himself within the consideration (1), according to *Mildmay's case*, 1 Co. 176. 7 Co. 40. 11 Co. 23. Wherefore they gave judgment for the plaintiff.

(1) The reason for this opinion, as given in 2 *Barnard*. is, that the person being ascertained in the deed, an averment of a consideration, may be allowed, and it being stated in the case that the plaintiff was nephew to the covenantor, they considered that as a sufficient averment of a consideration. In conformity with which the report in *Fitzg.* states that Lord *Raymond* upon the first argument was of opinion, that the consideration mentioned in the deed, did not extend to the plaintiff, and he states the doubt to be, whether, as the averment must be not only that the plaintiff was of the blood of the covenantor, but that the consideration was for the advancement of

his family, it can be made consistently with the special consideration mentioned in the deed. In *Peacock v. Monk*, 1 Vez. 128. Lord *Hardwicke* is of opinion, that where a deed states that it is made in consideration of a particular thing, that imports the whole consideration, and is a negative to any other. But perhaps a distinction may arise where the consideration appears upon the face of the deed not to extend to all the uses intended to be raised by it, since with respect to such uses it is the same as if no consideration at all had been mentioned, and the averment of one to support them is no contradiction of the deed.

Pratt vers. Pratt. At the Rolls.

THE late Chief Justice died leaving several children, and seised of *Borough English* lands. And having made no will, it became a point upon the statute of Distributions, whether the youngest son should bring these lands into hotchpot, or was not to be considered as an heir at law, who by the statute is to have a distributive share without any allowance for lands by descent.

Borough English lands shall be brought into hotchpot on the statute of Distributions. *Fitzg.* 284. the arguments at the bar but no decision.

*Lutwiche v.
Lutwiche, poss.
Hil. term. 1734.
contra (1).*

And Sir Joseph Jekyll ruled, that he should allow for these lands. For he said the statute only intended to provide for the heir of the family, who is the common law heir, and not for one who is only heir by custom in some particular places.

(1) Reported *Cas. temp. Talb.* Talbot, ib. 280. Robinson on Gavelk, 276. and that the present decree was reversed by Lord Chancellor Appendix.

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Trinity Term

5 & 6 Georgii 2. In B. R.

Robert Lord Raymond, *Lord Chief Justice,*

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

William Lee, *Esq;*

} *Justices,*

Sir Philip Yorke, *Knt. Attorney General,*

Charles Talbot, *Esq. Solicitor General.*

Rutherford *vers.* Scott.

THE defendant coming up by *habeas corpus* from the Admiralty, appeared to be charged there at the suit of several owners, for embezzling the goods of the ship. And the plaintiff here making an affidavit that he was indebted to him on a promissory note, the court took him from the Admiralty, and sent him to the marshal. For they said the cause in the Admiralty might as well be followed in an action of trover, and they paid no regard to the Admiralty method of sending over a commission to examine foreign witnesses, which was a privilege that urged the plaintiffs below could not have in this court.

If a suit is pending in B. R. against one in the Admiralty custody, he must be turned over to the marshal.

Burry *vers.* Perry.

CASE for words spoken of a house-smith, *per quod* he lost the custom of A. B. and C. and 5 s. damages given. And

Where no more costs than damages.

L. Raym. 1588.

2 Barn. B. R. 79. 84. 113. 153. 2 Kely. 71, S. C.

ruled

ruled there should be no more costs, the words being agreed to be actionable of themselves (1).

(1) *Woodhouse v. Bidwell*, 2 *Tiffin v. Glas*, *ib.* 142. *Collier* *Keb.* 654. *Surman v. Sheeleto*, *v. Gaillard*, 2 *Black.* 1062. S. P. 3 *Burr.* 1688. *Baker v. Hearn*, in *C. B. Denny v. Wigg*, *Pratt.* *Bull. L. N. P.* 11. S. P. in *E. R. Reg.* 111. *Co. Caf. Pr. C. P.* *Turner v. Horton*, *Barues* 132. 139. is contra.

[937]

Read *vers.* Chapman.

If the mate becomes master he can only sue in the Admiralty for his wages as mate.

2 *Kel.* 226.

pl. 178.

2 *Barn. B. R.*

360. S. C.

A Man went out mate, and in the voyage the master died, and he succeeded to the command of the ship. And having brought her home, he sued in the Admiralty for his wages as mate, and for a further allowance after he became master. And the court granted a prohibition *quoad* the time he was master (1), and refused it *quoad* the time he was mate.

(1) *Ragg v. King*, *ante* 858. S. P. in *Clay v. Snelgrave*, 1 *Ll. Raym.* 577.

Dominus Rex *vers.* Roberts.

Conviction affirmed after death of the party.

1 *Sess. Ca.* p.

176. No. 158.

S. C. but not

S. P.

THE defendant being a bricklayer, was convicted for not building party-walls according to the statute. And having brought a *certiorari*, died before argument. Notwithstanding which the court would go on and affirm the conviction.

Dominus Rex *vers.* Lowfield.

What amounts to bringing down an indictment to trial so as to save the recognisance and costs.

a *Kely.* 69. S. C.

AN indictment for perjury being removed by *certiorari*, the defendant made up the record, and carried it down to the sittings, with a *disfringas*, and Mr. Attorney's warrant for a *tales*. There being a special jury, eleven only appeared. And the counsel for the prosecutor would not pray a *tales*, though the warrant was given them: and the counsel for the defendant not praying one, the cause was made a *remanet pro defectu juratorum*. And upon motion for costs for not going on to trial, the court held, the defendant should pay none, he having done all that was necessary to put the prosecutor in a capacity to try the cause, if he would (1).

(1) *Vide Rex v. Righton*, S. P. where the defendant had a warrant and did not use it. 3 *Burr.* 1694.

Holt *vers.* Ward Clarendieux.

Ante 850.

THE plaintiff declared, that it was mutually agreed between the plaintiff and defendant, that they should marry at a future day, which is past, and that in consideration of each other's promises, each engaged to the other; notwithstanding which the defendant did not marry the plaintiff, but had married another, which she lays to her damage of 4000*l*.

An infant may sue on a contract of marriage with a person of full age.

Fitzg. 175. 275.
1 Barn. B. R.
277. 333. 342.
455.

2 Barn. B. R.
12. 173. 176.
3 Bac. Abr. 574.
S. C.
Et vide 3 Ark.
306.

The defendant with leave of the court pleaded double (*viz.*) *non assumpsit*, and that the plaintiff at the time of the promise was an infant of fifteen years of age.

The plaintiff joins issue on the *non assumpsit*, and a verdict is found for her, with 2000*l* damages. And as to the plea of infancy demurred.

[938]

This cause was several times argued at the bar, 1. By Mr. *Strange* for the plaintiff, and Serjeant *Chapple* for the defendant. When the court inclined strongly with the plaintiff, because though the defendant would not have the same remedy against her by action for damages, yet they thought he might have some remedy, *viz.* by suit in the ecclesiastical court, to compel a performance, the plaintiff being of the age of consent: and that would be a sufficient consideration. And therefore appointed an argument by civilians, to see what their law would determine in such a case.

This remedy is taken away by 26 Geo. 2. c. 33. intitled an act for the better preventing of clandestine marriages. sect. 13. n. 10 ad. ed.

Upon the arguments of the civilians, no instance could be shewn, wherein they had compelled the performance of a minor's contract. And they who argued for the defendant, strongly insisted, that in the case of a contract *per verba de futuro*, (as this was) there was no remedy, even against a person of full age, in the spiritual court; but only an admonition. And the only reason why they hold jurisdiction in the case of a contract *per verba de presenti* is, because that is looked upon amongst them to be *ipsum matrimonium*, and they only decree the formality of a solemnization in the face of the church.

After their arguments it was spoke to a fourth time by Mr. *Reeve* and Serjeant *Eyre*. And now this term the Chief Justice delivered the resolution of the court.

The objection in this case is, that the plaintiff not being bound equally with the defendant, this is *nudum pactum*, and the defendant cannot be charged in this action. Formerly it was made

3 Mod. 511.
Balk. 437.
Carter 236.

made a doubt by my Lord *Vaughan*, whether any action could be maintained on mutual promises to marry; but that is now a point not to be disputed. And as to the present case, we should have had no difficulty in giving judgment for the plaintiff, if we could have been satisfied by the arguments of the civilians, that as the plaintiff was of the age of consent, any remedy, though not by way of action for damages, could be had against her. But since they seem to have had no precedent in the case, we must consider it upon the foot of the common law. And upon that the single question is, whether this contract as against the plaintiff, was absolutely void. And we are all of opinion, that this contract is not void, but only voidable at the election of the infant: and as to the person of full age it absolutely binds.

[939]

The contract of an infant is considered in law as different from the contracts of all other persons. In some cases his contract shall bind him; such is the contract of an infant for necessaries, and the law allows him to make this contract as necessary for his preservation; and therefore in such case a single bill shall bind him, though a bond with a penalty shall not. 1 *Lev.* 87.

Where the contract may be for the benefit of the infant, or to his prejudice; the law so far protects him, as to give him an opportunity to consider it when he comes of age: and it is good or voidable at his election. *Cro. Car.* 502. 2 *Roll.* 24. 427. *Hob.* 69. 1 *Brownl.* 11. 1 *Sid.* 41. 1 *Vent.* 21. 1 *Mod.* 25. *Sir W. Jones* 164. But though the infant has this privilege, yet the party with whom he contracts has not: he is bound in all events. And as marriage is now looked upon to be an advantageous contract, and no distinction holds whether the party suing be man or woman, but the true distinction is whether it may be for the benefit of the infant; we think, that though no express case upon a marriage contract can be cited, yet it falls within the general reason of the law with regard to infants' contracts. And no dangerous consequence can follow from this determination, because our opinion protects the infant, even more than if we rule the contract to be absolutely void. And as to persons of full age, it leaves them where the law leaves them, which grants them no such protection against being drawn into inconvenient contracts.

Balk. 24.

For these reasons we are all of opinion that the plaintiff ought to have her judgment upon the demurrer.

Michaelmas Term

6 Georgii 2 Regis. In B. R.

Robert Lord Raymond, *Lord Chief Justice*,

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

William Lee, *Esq;*

} *Justices.*

Sir Philip Yorke, *Knt. Attorney General*.

Charles Talbot, *Esq; Solicitor General*,

Hayward *vers.* Newton.

AN action was brought for these words spoken of the plaintiff as a wine merchant, "You are a rogue, villain and rascal, and sell by short measure;" and the jury gave twenty shillings damages. And though it was thought a hard case, yet the court said it has always been denied to set aside a verdict for smallness of damages, and therefore denied it in this case. *Quare* *nam* why it is not within the reason of setting aside a verdict for excessive damages (1). *Ante* 245.

Verdict not to be set aside for smallness of damages. *Salk.* 647. *2 Barn. B. R.* 177. *S. C.*

(1) *Barker v. Sir Wolston Dixie*, arises from a mistake of the law *1051. Mauricet v. Brecknock*, either in the Judge or the jury. *Woodford v. Eades*, *ante* 425. *Ing.* 509. *S. P. Secus* where it

Ex dimiss^o Lomax *versus* Holmden et alⁱ.

Where access is presumed, y^t evidence may be given of the impossibility of begetting children. Cited And. 9.

[94ⁱ]

IN ejectment the question on a trial at bar was, whether the lessor was son and heir of *Caleb Lomax*, Esq; deceased, which depended on the question of his mother's marriage. And that being fully proved, and evidence given of the husband's being frequently at *London*, where the mother lived, so that access must be presumed; the defendants were admitted to give evidence of his inability from a bad habit of body (1). But their evidence not going to an impossibility, but an improbability only; that was not thought sufficient, and there was a verdict for the plaintiff.

(1) *Vide ante* 925. *Pendrell v. Pendrell*, and the note.

Ball *versus* Knight.

It is not a good custom for an inferior court to award a *tales de circumstantibus*. Fitzg. 274. 1 Barn. B. R. 453. 2 Barn. B. R. 164. 194. S. C.

ERROR of a judgment given in *Bristol* court, after a verdict for the plaintiff. And on the record it appeared, that seven of the panel were sworn, *et quia residui ejusdem jur' non comperuerunt ideo secundum consuetudinem civitatis predictae alii de circumstantibus per servientes ad clavam civitatis predictae ac ministros curiae predictae ad hoc electi ad requisitionem prefati (queri) per mandatum curiae hic de novo apponuntur quorum nomina in panello ultimo mentionato affilantur in curia hic secundum formam statuti in hujusmodi casu editi et provisi*. And then they join with the others, and give the verdict.

It was now objected, that this was error, it being a custom contrary to law. And 1 *Roll. Abr.* 563. pl. 15. was cited in point. Before the statute *Westm.* 2. all trials but in assises were at bar on the *venire*; and if a full jury did not appear, a *decem tales* was awarded. Then came the statute *Westm.* 2. c. 30. and gave a *nisi prius*. All trials are by *Magna charta* to be *per pares*, and 7 & 8 *W.* 3. c. 32. which appoints *tales* men to be taken out of some of the other panels, shews it was designed, the parties should have some knowledge of them; and that barely being a by-stander was not sufficient. A custom to try by six jurors is void, 1 *Roll. Abr.* 564. pl. 17. *Cro. Car.* 259. Here is no custom to challenge, and yet 35 *H.* 8. c. 5. and 14 *Eliz.* c. 9. which give a *tales* in superior courts, thought that reasonable. Many more cases were cited to prove from similar instances, that such a custom was illegal. *Dav.* 53. 1 *Roll. Abr.* 563. pl. 11. 13, 14. 564. pl. 20. *Dy.* 357. 1 *Roll. Abr.*

558. *Dav.* 34. b. 1 *Sid.* 267. *Pal.* 211. *Mo.* 8. 2 *Inf.*
46. 2 *And.* 152.

It was further objected, that none but *liberi homines* could be jurors, whereas these standers-by might be aliens, infidels, &c. and they appear to have been sworn at the election of the plaintiff only.

E contra it was argued to be a good custom, being for the expedition of Justice. And to the express authority of 1 *Roll. Abr.* 563. pl. 15. was opposed 2 *Roll. Abr.* 672. R. 1. where it is entered otherwise, but with a *dubitatur*. And as to the objection that it is against law, it was answered, that all customs are so; the only question is if it be a reasonable alteration, and that it is so, is proved from the statutes which have actually made this alteration with regard to superior courts. And 1 *Roll. Abr.* 564. pl. 16. 18. *Cro. Eliz.* 894. 1 *Mod.* 96. *Trials per pais* 69. were cited. And the allowance of a custom to deviate before the statute *Hen.* 8. was relied on.

[942]

The court upon the first argument seemed strongly inclined for the custom. But afterwards the city counsel certifying, that they never have a *tales* in *London*, and the court taking notice that the judgment said to be reversed for this error in 1 *Roll. Abr.* 563. was in *Charles* the First's time, and is actually entered up; and the *dubitatur* in 2 *Roll. Abr.* 672. was in the time of *James* the First, and that this was not to be distinguished from the case of six jurors. They reversed the judgment.

Peak *vers.* Bourne.

THE plaintiff declared in prohibition, that he was sued in the spiritual court for executing the office of deputy parish-clerk without the licence of the ordinary.

A parish-clerk may execute the office by deputy without licence of the ordinary.

Quere whether a temporal or a spiritual officer, and whether he can appoint a deputy.

1 *Barn. B. R.*

377. 450.

Fitzg. 105. 272.

S. C. by the name of *Peat v. Birt*, the argument but no decision.

On demurrer three points were made: 1. Whether a parish-clerk be a temporal or a spiritual officer; 2. Whether he can make a deputy; and 3. Whether the licence of the ordinary is requisite.

It was argued three several times upon all the points. But the court in giving judgment founded themselves only upon the last, to which they held that a licence was not necessary, and therefore gave judgment for the plaintiff in prohibition. They held the canon did not require it, and indeed it would be a transgression the right of appointment to all intents and purposes to the

the ordinary: the *Institutio juris canonici* 22. says, He may be appointed *solo presbytero absque scientia episcopi*. 2 Roll. Abr. 286. pl. 44.

As to the other two points, the court strongly inclined that he was a temporal officer as to the right of his office, and that he might make a deputy.

[943]

For the first were cited 18 E. 3. 27. 13 Co. 70. 2 Cro. 670. Pal. 379. Mar. 101. 1 Keb. 286. 2 Roll. Abr. 285. pl. 37. 2 Brownlow 11. 1 Lev. 75. 1 Vent. 143. 2 Lev. 18. Salk. 536. Godb. 163. Old. Bendl. 142. 1 Leon. 94. Fitzh. Annuity 40. Hugh's Parson's Law 275. And when the court were pressed with their own authority in *Townsbend v. Thorpe*, ante 776. they said it was a hasty opinion, into which they were transported by the enormity of the case (1).

For the second were cited 1 Roll. Rep. 274. Mo. 845. (3 Bullst. 77. 2 Roll. Rep. 274. 9 Co. 48.) That a constable may make a deputy: and the common distinction is between a judicial and a ministerial officer, as a parish-clerk certainly is.

(1) *Vide Gaudye's case*, 2 Brownl. 48. *Pitts v. Evans*, post. 1108, *Tarrant v. Haxby*, 1 Burr. 367. S. P.

Chapman *vers.* Lamb.

Goods that are not imported by way of merchandize pay no duty. 2 Barn. B. R. 168. 212. 2 Kely 231. S. C. more full. *Treover* lies against the officer who seizes and carries them away (1).

IN *treover* for fourteen shirts, a night-gown, and cap, a case was made for the opinion of the court. That the plaintiff arrived at *Dover* from *France*, and brought the goods with him as his own wearing apparel, and not as merchandize, or for sale; and the defendant seized them for non-payment of duty.

Ketelby for the plaintiff insisted, that by 13 & 14 Car. 2. c. 11. § 14. no goods are liable, but as such are imported as merchandize, and cited *Vaugh.* 165.

Reeve contra insisted, that the plaintiff is by this one importation a merchant within the 12 Car. 2. c. 4. and that the only test whether goods are imported as merchandize is, whether they are such as may be exposed to sale: at this rate every man may import his own wine, or silks for all his family. He said

(1) *Tinkler v. Poole*, 5 Burr. 2657. S. P.

the Attorney General insisted to speak to it, so the court ordered an *ulterius concilium*, though they inclined strongly for the plaintiff.

And this term Mr. Attorney came into court, and said that it being stated with negative words, that the goods were not imported as merchandize, it was too hard for him to maintain; but if it had stood only upon the words that he did not bring them in to sell, he would have contested it. So the plaintiff had judgment.

Maud *vers.* Branthwaite.

THE defendant being in custody, the plaintiff obtained *Prædictio* judgment. And instead of charging him in execution, whereby he would be intitled to his discharge on the Lords' act; the plaintiff brought an action of debt upon the judgment, and charged him in custody. But on application to the court, when he had lain two terms after the judgment, the court discharged him on common bail, saying, It was a trick to deprive the defendant of the benefit of a merciful law (1).

[944]

(1) *Vide Blandford v. Foot, Cowp. 75.*

Dominus Rex *vers.* Inhabitantes de Eckershall.

AN order was made on 7 & 8 W. 3. c. 29. for the parish at 3 & 4 W. & M. large to repair the highways, the 6 d. in the pound levied *c. 12.* on the inship not being sufficient. And a *certiorari* being moved *7 & 8 W. 3. c. 29.* for, it was objected, that 3 & 4 W. & M. c. 12. had taken it *Cartiarii, Highways.* away; to which it was answered, that this is an order founded *1 Inst. Co. p. 179. No. 163.* on a subsequent law. *Sed per curiam*, They must both be taken *S. C.* together: the rate must be made in aid of the inship, by virtue of the former law. So a *certiorari* was denied,

Lewis *vers.* Fog.

At Nisi prius in Middlesex, coram Raymond Chief Justice.

IN an action by the master for the defendant's dog's biting his apprentice, *per quod servitium amisit*, the Chief Justice allowed the apprentice to be a witness (1).

Apprentice witness for master in action *per quod servitium amisit*.

(1) *Dunsley v. Westbrowne, ante Harding, ante 595. Cock v. Worsham, post. 1054.* 414. contra. But that the present decision is law, *vide Duet v.*

VOL. II.

X

Hilary Term

6 Georgii 2 Regis. In B. R.

Robert Lord Raymond, Lord Chief Justice.

Sir Francis Page, Knt.

Sir Edmund Probyn, Knt.

William Lee, Esq;

Sir Philip Yorke, Knt. Attorney General.

Charles Talbot, Esq; Solicitor General.

} Justices.

Dominus Rex *vers.* Davis.

Ha' cor' to remove a prisoner from *Wales* to an *English* county.
2 Barn. B. R.
222. S. C.

A *Habeas corpus* was granted (without any affidavit) to remove the defendant from *Brecknock* gaol to *Hereford*, to take his trial there on an indictment; pursuant to the opinion in *Athoe's* case, *ante* 553. that the adjacent *English* county has a concurrent jurisdiction by the statute 26 *Hen. 8. c. 4.*

Lambert *vers.* Branthwaite.

The *solvendum* in a bond is a sufficient description of the obligee.

DEBT on bond: on *oyer* it appeared to be *teneri et firmiter obligari in viginti libris solvendis eidem Richardo Lambert.* And after verdict *pro quer'* on *non est factum* pleaded, it was objected that there was no person to whom he was said to be bound, or to whom *eidem* can refer. 1 *Lev.* 235. But on authority of 3 *Lev.* 21. the judgment was affirmed.

Dominus Rex vers. Moore.

AN indictment for perjury was removed by *certiorari*, and the defendant paid costs for not going on to trial: the prosecutor afterwards moved to quash it, which the court refused, unless he would submit to pay costs (1). *Strange pro defendente.*

Court will oblige prosecutor in some cases to pay costs on quashing an indictment. 2 Kely. 103. S. C.

(1) *Vide Rex v. Webb*, 3 Burr. 1469.

Musgrave vers. Bovey.

A Prohibition was granted to a suit for these words, spoken by one clergyman of another, "You are an old rogue and a rascal, and a contemptible fellow, despised and hated by every body" (1). *Cumb. 253.*

What not a spiritual defamation. 2 Kely. 101. 103. S. C.

(1) *Coxeter v. Parsons*, Salk. Gibs. Cod. 1025. 2 Burn's Eccl. 692. *Hall v. Downes*, Com. 309. Law 119.

Oliver vers. Lawrence.

A Rule to answer the matter in an affidavit was discharged on my motion, because on the affirmation of a Quaker, and this is a criminal prosecution. *Ante 441. 527. 872.*

No rule to answer on the affirmation of a Quaker.

Jenys vers. Fawler et al'.

At Guildhall, coram Raymond Chief Justice.

IN an action by the indorsee of a bill of exchange against the acceptor, it was held not to be necessary, to prove the hand of the drawer: and the plaintiff rested on the proof of the acceptance. The defendant offered to prove it a forged bill, by calling persons who were acquainted with the hand of the drawer, and would swear they did not believe it to be his hand. But the Chief Justice would not admit this, from the danger to negotiable notes, and because a man might with design write contrary to his usual method. And he strongly inclined, that even actual proof of forgery would not excuse the defendants against their

The acceptor cannot set up a forgery of the bill.

their own acceptance, which had given the bill a credit to the indorsee (1). *Strange pro quer'*, who had a verdict.

(1) *Price v. Neale*, 3 Burr. 1354. In *Smith v. Chester*, 1 Term Rep. 654. acc. In *Cooper v. Le Blanc*, post. 1051. the inclination of Lord Hardwicke's opinion was *contra*; and the opinion of Lord Raymond himself in *Wilkinson v. Lutwidge*, ante 648. unless a distinction arises where the action is brought by the payee against the acceptor, (as that case seems to have been); and where it is brought by an indorsee for a valuable consideration as is the present.

Dominus Rex *vers.* Smith.

Excom' cap'.
Vide post. 950.

AN *excommunicato capiendo* was quashed for incertainty being in *causa defamationis sive convicii*, which last is too loose a word. Vide Litt. Dict. *Strange pro defendente*.

[947]

Launder *vers.* Cripps.

What a miscon-
tinuance.

BILL in C. B. against an attorney, where the proceedings are on a day certain. And after judgment by default, the writ of inquiry was returnable at a general return, and this was objected on error. *Strange contra* insisted it was but a miscon- tinuance, and cured by 32 Hen. 8. c. 30. and 4 & 5 Ann. c. 16. and it was so determined *Rex v. Episcopus Miden'*, ante 62. On the authority of which case the judgment was affirmed.

Lockyer et al' *vers.* Savage et al'. In Scaccario.

The child of a
freeman of Lon-
don when of age
may in confi-
deration of a pre-
sent fortune bar
herself of her
customary part.
2 Eq. Abr. 260.
p. 4.

THE plaintiffs brought a bill as assignees of a commission of bankruptcy against Norris, to have an account of the personal estate which the bankrupt's wife's father died possessed of, he being a freeman of London.

The defendants insisted, that by articles between the bankrupt and Freeman and his daughter, previous to the marriage, she had in consideration of 4000*l.* advanced by the father in his life- time, released her right to any farther demand out of the personal estate; and that the 4000*l.* was settled to the use of the bank- rupt for life, but if he failed in the world, the trustees were not to pay the produce to him, but apply it to the separate main- tenance of the wife and children.

Upon

Upon the hearing two points were ruled, 1. That a child of full age might, for the consideration of a present advancement, bar herself of the customary share (1). And that it was stronger in the case of a child who had a right, than in the case of an intended wife, which had been allowed. 2 *Vern.* 665. 2. That the provision for her maintenance in case the husband failed, was good against creditors; it not being a provision out of the bankrupt's estate, but the settlement of her own fortune. *Abr. Equ. Cas.* 53, 54. And though it was objected, that the profits were forfeited by the act which was to vest the separate right in the wife, viz. bankruptcy; and when two rights concur, *fortior est dispositio legis quam hominis* (2): yet the court compared it to the case of a lease, where the lessee is restrained from assigning without consent of the lessor, and the assignment has always been held to be void (3). The bill was dismissed with costs. *Strange pro defendente.*

The fortune of a wife may be settled on husband till he fails, and then to her separate use.

(1) But if the father oblige his child to release for the sake of maintenance it is void, as a fraud upon the custom. *Heron v. Heron*, 2 *Atk.* 160, *Widd Metcalf v. Ives*, 1 *Atk.* 63. that if the wife be under age, and the husband and she, in consideration of a marriage portion covenant to release, the wife's orphanage share, the hus-

band's covenant would be considered in equity as an absolute release and extinguish the wife's right.

(2) See *Tully v. Sparkes*, ante 867. and the cases cited n. 1.

(3) *Roe v. Galliers*, 2 *Term Rep.* 133. and see the cases cited *Cooke's Bank. Law.* 3 ed. 448.

Easter Term

6 Georgii 2 Regis. In B. R.

N. B. *The Lord Raymond dying the last vacation, there was no Chief Justice this term.*

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

William Lee, *Esq;*

} *Justices.*

Sir Philip Yorke, *Knt. Attorney General.*

Charles Talbot, *Esq; Solicitor General.*

Memorandum : All writs were directed to Mr. Justice Page, and *teste* in his name.

Case of the Borough of Calne in Wilts.

Mandamus.

AFFIDAVIT being made, that the steward who keeps the publick books had refused to produce them at the corporate meeting, to enter the elections of their members; a *mandamus* was granted to him, to attend with the books at the next corporate assembly (1).

(1) *Vide Rex v. Wildman, ante 879.*

[949]

Case of the Borough of Evesham.

Mandamus.

THE custom is to give 24 hours notice of an election: a *mandamus* was granted to chuse a capital burges. And it was moved on the other side to fix a day, or that it might be on

on six days notice. But the court would give no directions, saying they could not alter the constitution of the borough.

Baker vers. Westbrooke.

IT was refused to let the defendant plead *non assumpsit*, and a Plead double tender (1).

(1) *Maclellan v. Howard*, 4 all the cases concerning pleading
Term Rep. 194. *Kay v. Patch*, double under the statute for the
27 Geo. 3. B. R. cited *ib.* S. P. amendment of the law collected.
See also *Jenkins v. Edwards*, 5 5 Com. Dig. Pleader. (E. 2.)
Term Rep. 97. But *Whaley v. Har-* 388.
rison, Barnes 360. seems *contra* See

Horne vers. Bushell.

ERROR was brought of a judgment in the *Marshalsea* court, and error in law assigned, and the judgment affirmed. Then a writ of error *coram vobis*; which the court said could not be allowed without leave, and therefore held it *no superseas*. Ante 690.

After affirmance
no writ of error
coram vobis is a
superseas with-
out motion,
2 Barn. B. R.
253, 260, 262.
S. C.

Macarty vers. Barrow.

THE defendant in January 1728. drew bills on Spain, which in March were returned protested for non-acceptance; between the drawing and return he became a bankrupt: and being sued to execution as the drawer, he moved on the act 5 Geo. 2. c. 30. § 7. to be discharged, it being a debt contracted before his bankruptcy.

Bankrupt.
2 Barn. B. R.
251, 255.
3 Will. 17.
2 Kely. 239. pl.
191. S. C.

Strange contra insisted, that this cause of action arose upon the non-acceptance and protest, which are both necessary to be averred in order to maintain the action, and the charges thereof are to be recovered.

Sed per curiam, The principal is the drawing the bills (1), and therefore he must be discharged. *Quere tamen*.

(1) The reason as given more the bills, and that the non-acceptance &c. raises no debt, but the debt is contracted by drawing is merely a notice to the drawer that

that the drawee will not pay. Upon this principle it has been held, that if a bill of exchange be not accepted, an action will lie against the drawer before it is made payable. *Bright v. Purrier*, Bull. L. N. P. 269. *Milford v. Mayor*, Doug. 54. 3 ed. S. P. and that the indorsee of a promissory note may be discharged under an insolvent act. (12 Geo.

3. c. 23. § 21.) which takes place before it becomes due. *Harman v. Leake*, Cowp. 22. The present case is more fully reported and the authority of it recognized by *Wilmot C. J.* 3 Wils. 17. and said that the court held that 7 Geo. 1. c. 31. extended to it. The point therefore appears to be settled.

Trinity Term

6 Georgii 2 Regis. In B. R.

No Chief Justice.

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

William Lee, *Esq;*

} *Justices.*

Sir Philip Yorke, *Knt. Attorney General.*

Charles Talbot, *Esq; Solicitor General.*

Leehill vers. Sir Thomas Reynell.

IT was ruled that the election in amending, to pay costs or give an imparlance, was in the defendant, and not in the plaintiff: and said to be the practice of *C. B.*

Practice:
1 Lill. Prac.
Reg. 70, 475.
Comb. 58. acc.
Vide 2 Keb.
Feb. 175, 428.

120, 363.

Dominus Rex vers. Keat.

THE court refused to quash an *English excommunicato capi-endo* that was for slander or defamation, saying that was not uncertain as *convicium* was.

Excommunicato capi-endo.
2 Kely. 132.
S. C.
Vide ante 946.

Between the Parishes of Lidney and Stroud in Gloucester.

UPON a special order of sessions it was stated, that a maid was hired for a quarter of a year, and if she and her master liked one another, she was to continue the whole year,

Poor.
Burr. Sett. Ca.
1. and Sett. Ca.
Ed. 1750. p.
211. vol. 1. no.

175. Bott. by Conf. 2 vol. 411. S. C. all more full.
and

and have 3 *l.* for her year's wages: that she staid the year out, and had her 3 *l.* And this on debate was held to be a settlement (1).

(1) *Rex v. New Windsor, Burr.* nion of *Foster J.* that these cases
S. C. 19. *Rex v. Atherton, ib.* have carried the matter as far as
203. *post.* 1182. *Rex v. St. Ebbs,* possible. *Rex v. Ham, ib.* 306.
ib. 289, S. P. and *vide* the opi-

[951]

Gambier *vers.* Wright.

Where a prisoner
is removed from
B. R. to C. B.
there is no need
in action of
escape to shew a
process against
him in C. B.
2 Kely. 115.
a Burn. B. R.
257. S. C.
more full.

ERROR of a judgment in C. B. in an action of escape against the warden of the Fleet: and the declaration set out, that William Wilkinson being indebted to the plaintiff in 200 *l.* for goods sold and delivered, he sued out a *latitat* against him, by virtue whereof he was arrested, and committed to the marshal, from whence he was carried by *habeas corpus* before Mr. J. Denton, a Judge of C. B. who committed him to the Fleet charged with the plaintiff's *latitat*, and the plaintiff sued him to judgment, and then the defendant permitted him to escape. On Not guilty pleaded there was a verdict and judgment for the plaintiff.

Serjeant Hawkins for the plaintiff in error argued, that the prisoner being in custody of B. R. could not be taken from thence without some process in C. B. which ought to be set out, and without which the Judge had no power to commit him. And if he was there illegally, the warden was in the right to let him go. And he cited 1 Roll, Rep. 217, 276. Cro. El. 223. 31 H. 6, 10. Lutw. 1468. Mo. 274. 2 Leon. 84. 2 Bulf. 62. Cro. El. 877. Cro. Jac. 394. Salk. 273, 700.

Denison contra. In the case of a superior court you will not presume they act without jurisdiction, and the *habeas corpus* gave it. The plaintiff is a stranger to the other's writ, and therefore not to be expected to set it out: all the precedents are in this manner. Lev. Ent. 56. Vide 181, 194. 2 Brown. Ent. 13, 14. Rob. Ent. 307. Lill. Ent. 157, 188. Besides, this is but error in process, of which the warden can take no advantage. 2 Saund. 100.

The court strongly inclined the declaration was well enough, but ordered an *ulterius*; and this term I declining to argue it for the warden, the judgment was affirmed of course.

Duckett *vers.* Martin.

PENDING error to reverse an outlawry on *mesne* process, the defendant in error moved to quash the writ, because no bail was given. *Sed per curiam*, That is never done till the outlawry is reversed; and then we take bail to appear to an original to be brought within two terms. And so it was done in this case (1).

No bail in error of an outlawry till reversal.
2 Barn. B. R. 286, 298. S. C.

(1) As this case is cited in 1 *Wils.* Barnard. 298. it said that the court refused to reverse the outlawry till bail had justified. *Vide* *Serecold v. Hampson*, *post*. 1178.

Dominus Rex *vers.* Biddle et Taylor.

[952]

INFORMATION in the nature of a *quo warranto* for exercising the office of capital burgesses of *Evesham*, and charging an usurpation from 20 *August* to the first day of *Hilary* term last. The defendant confesses an usurpation from 20 *August* to 29 *September*, and from thence insists on an election. The prosecutor replies as to the election. And on the trial a special verdict is found; and as to the time confessed, he enters up judgment of *ouster*, according to the opinion given in the mayor of *Penryn's* case, *ante* 582. and the words of 9 *Ann. c.* 20. § 5. which warrant such a judgment, where the defendant is adjudged guilty of an usurpation.

Where the defendant confesses an usurpation for part of the time only, there can be no judgment of *ouster*.
2 Kely. 272.
2 Barn. B. R. 238, 280, 316, 320. S. C. and the note.

The defendant moved that all the judgment but that of a *capiatur pro fine* might be expunged; which the court ordered to be done, as the proper punishment for his acting before duly elected. But said it would be hard that a subsequent good election should be done away, as it would be by this judgment. They distinguished it from *Pender's* case above, where he was guilty of an usurpation during all the time charged in the information.

Horne *vers.* Boosey.

At Guildhall coram Page J.

ONE not the proper officer seized brandy going with a permit, and carried it to the King's warehouse, and on information in the Exchequer it was condemned.

Where a condemnation in the Exchequer is conclusive and In where not.

and have 3 *l.* for her year's wages: that she staid the year out, and had her 3 *l.* And this on debate was held to be a settlement (1).

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Where a condemnation in the Exchequer is conclusive and In where not.

Trinity Term 6 Geo. 2.

In trover *Page J.* held, that if a proper officer had seized, he would not examine the property in this action, for the owner ought to claim in the Exchequer. But he considered this as a seizure by a stranger, the defendant being a tidesman, who could not enter a house without a writ of assistance and a peace officer the words of his warrant being so restrained; and because this was not rightly in the King's warehouse, he directed the jury *pro quer'*. The jury found *pro quer'* for brandy and casks (1).

(1) *Vide Tinkler v. Poole*, 3 *Wils.* 146. 5 *Burr.* 2657. *S. C.* and *Scott v. Shearman*, 2 *Black.* 977.

Michaelmas Term

7 Georgii 2 Regis. In B. R.

This term Sir Philip Yorke was made Chief Justice, and created a Peer, by the title of Baron Hardwicke of Hardwicke in the county of Gloucester.

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

William Lee, *Esq;*

Charles Talbot, *Esq;* Solicitor General.

} *Justices,*

Dominus Rex *vers.* Jocamb.

THE court held that a *qui tam* information is not to be quashed on motion (1).

Qui tam not quashable.
1 Sess. Ca. p. 228. no. 185.

p. 241. no. 191. 2 Barn: B. R. 311, 323, 339. S. C.

(1) *Reg. v. Potter, And. 217. Rex v. Holmes, ib. 216. Garland v. Barton, post. 1103.*

Barfoot *vers.* Reynolds et al'.

TRESPASS, assault and battery against Reynolds and Westwood. Reynolds pleaded *son assault*: and Westwood pleaded, that he was servant to Reynolds the other defendant, and that the plaintiff having assaulted his master in his presence, he

How the servant is to justify an assault in defence of his master.

2 Barnard. 327. S. C. 11 H. 6. 16. 14 H. 6. 24. 2 Roll. Abr. 546. Bro. Treas. 383.

in

[954]

in defence of his master struck the plaintiff. And on demurrer the plea was held ill, for the assault on the master might be over, and the servant cannot strike by way of revenge, but in order to prevent an injury; and the right way of pleading is, that the plaintiff would have beat the master, if the servant had not interposed, *prout ei bene lieuit*. The plaintiff had judgment.

Cowne *vers.* Barry.

What comes under a *scilicet* rejected.
2 Kely. 135.
S. C.

Ante 622.

DEBT upon a bond; the defendant pleaded payment before the day. And it being found for the plaintiff, the court inclined to award a repleader, according to the case of *Merril v. Jocelyn*, Trin. 13 Ann. But it being observed at another day, that the time of payment was only alleged under a *scilicet*, the court held it a good plea on the act for amendment of the law, as a payment before exhibiting the bill; and then the issue joined was material. And the plaintiff had judgment.

Bates *vers.* Pettipher.

How the forty miles distance from London is to be computed as to notice of trial.

2 Barn. B. R.
331. S. C.

THE defendant lived at *Aylebury*, and not having fourteen days notice of trial, moved to set aside the verdict, upon an affidavit that it measured forty-two miles from London, and paid for so many post.

On the part of the plaintiff it was sworn, that it was computed to be but thirty-three miles. *Et per curiam*, We must go by the usual computation; our rule was ancients than these post miles, and consequently respected the computation, before the erection of post miles. It was therefore held that the notice was good (1).

(1) *Osgood v. Lyon*, post. 1216. S. P.

Bishop *vers.* Stacy.

Amendment after special demurrer.
2 Barn. B. R.
293.
2 Kely. 127.
S. C. but not S. P.

AFTER a special demurrer, and joinder, and argument, the plaintiff had leave to amend by the bill upon the file. And this was granted upon debate (1).

(1) *Vide Robinson v. Raley*, 1 686. amendment of a plea after *Burr.* 321. and *Rex v. Betts*, ante demurrer upon the crown side.

Warriner *vers.* Giles.

AFTER the fire of London, power was given to the city to set out the publick markets, which was done in a very accurate manner, and entered in their books. An ejectment was brought by the lessee of one of the markets, wherein the boundaries were in question. And it was moved on behalf of the plaintiff, to have liberty to inspect the books, and take copies; which was granted. And the court compared it to the case of court rolls, which are not considered as the evidence of the lord, but in the nature of publick books, for the benefit of the tenant as well as the lord (1).

Leave given to inspect books in which boundaries are entered.

[955]

(1) *Vide Rex v. The Fraternity of Hostmen in Newcastle, post.* 1223. and the cases cited in the note.

Dominus Rex *vers.* Dempson.

ORDER upon the father to maintain the son's wife, after a divorce *a mensa et thoro* for adultery, was quashed on the authority of the King and Munden, Trin. (Geo. 1. ante 190.) due not being a natural relation of the father.

Father not bound to maintain the son's wife.

1 Sess. Ca. p. 230. No. 187.

2 Barn. B. R. 329. 364. 1 Bott by Conf. 324. pl. 410.

Smith *vers.* Smith. At Nisi prius.

THE plaintiff's intestate lodged at the defendant's house, and had furniture and plate there, and was proved to have said, that whatever he brought into those lodgings he never intended to take away, but gave directly to the defendant's wife. And now in trover for the goods which were there at the intestate's death, it was ruled, that a parol gift, without some act of delivery, would not alter the property, and that such an act was necessary to establish a *donatio causa mortis*. Upon this opinion it came to the question, whether there was any delivery. And to prove one, the defendant shewed, that the intestate, when he went out of town, used to leave the key of his rooms with the defendant; and that was insisted to be such a mixed possession, that the law will adjudge the possession to be in him who has the right. And the Chief Justice ruled it so, and the jury found for the defendant.

A parol gift without some act of delivery will not alter the property.

Thomas et al' *vers.* Bishop.

Action lies *cashier*
against a servant
upon a bill drawn
on him and ac-
cepted generally,
though the order
is to place it to
the account of the
master.

2 Barn. B. R.
320, 335.
3 Kely. 136.
Ann. 1. S. C.

[956]

S. C.
Cas. T. H.
1.

Cas. Tenny.
Henderson.

THE plaintiffs were indorsees of a bill of exchange drawn from Scotland upon the defendant, in these words, "A thirty days sight pay to J. S. or order 200*l.* value received of him, and place the same to account of the York Buildings company, as per advice from Charles Mildmay. To Mr. Humphrey Bishop, cashier of the York Buildings company, at their house in Winchester-street, London. Accepted 13 June 1732. per H. Bishop."

This bill not being paid, an action was brought against the defendant upon his acceptance. And the defendant proved that the letter of advice was addressed to the company; and that the bill being brought to their house, he was ordered to accept it, which he did in the same manner as he had accepted other bills. But Mr. J. Page, who tried the cause, directed the jury to find for the plaintiff, which they did accordingly.

And now upon motion for a new trial, the court held, that the direction was right. For the bill on the face of it imported to be drawn upon the defendant, and it is accepted by him generally, and not as servant to the company, to whose account he had no right to charge it till actual payment by himself. And this being an action by an indorsee, it would be of dangerous consequence to trade, to admit of evidence arising from extrinsic circumstances, as the letter of advice. And they said, this differed widely from the case of a bill addressed to the master, and under-wrote by the servant; where undoubtedly the servant would not be liable, but his acceptance would be considered as the act of his master. A bill of exchange is a contract by the custom of merchants, and the whole of that contract must appear in writing. Now here is nothing in writing to bind the company, nor can any action be maintained against them upon the bill; for the addition of cashier to the defendant's name is only to denote the person with more certainty, and the York Buildings house is only to inform the order, where the drawee is to be found; and the direction whose account to place it to, is for the use of the drawee only. And they compared it to the case in *Carth. 5. 2 Vent. 307.* where a bill was drawn payable to Price, for the use of Calvert, and held that the legal property was in Price, which is stronger than the present case. They said it might be otherwise if the action had been by J. S. who was privy to the transaction, and it had appeared he tendered the bill as a bill on the company. (But this plaintiff being a stranger, they could not consider those circumstances. The plaintiffs had their judgment. *Strange pro def.*)

Dominus Rex *vers.* Bettlesworth.

JOH^N Kynaston, Esq; made his will, and two persons ex-
ecutors, and left the residue of his personal estate to his
youngest son *Edward*. The executors renounced, and the re-
siduary legatee moved for a *mandamus*, to be admitted to prove
the will, and have administration with the will annexed. And
a rule was made to shew cause. At the day it was insisted on,
that this case differed * from Lord Londonderry's, *Hil. 3 Geo. ante*
857. where the commission of appraisement was set up against
the immediate grant of a probate, which the statute 21 H. 8,
c. 5. requires shall be without any frustratory delay. And the
ordinary has no election there; whereas in the present case he
is not bound to grant the administration to the residuary legatee,
none of the statutes mentioning him; on the contrary the 21 H.
8. c. 5. which takes notice of the renunciation of exe-
cutors, leaves the matter to the election of the ordinary.
And of this opinion was the court, who said, if the commission
of appraisement was a *gravamen*, it would be proper matter of
appeal; but they could not break into the practice of the court
below. And Lord Hardwicke mentioned a case in chancery be-
fore Lord Macclesfield, between *Wheeler* and *The Archbishop of*
Canterbury, where it was held, that these sort of administrations
are not within the statute of Distributions, which brings it to
Smith's case, *Hil. 4 Geo. 2. (ante 892.)* where a *mandamus* to
grant administration *durante minori etate* of an executor, to the
father of the executor, was refused; because there was no law
obliging the spiritual court so to do. The rule for a *mandamus*
was discharged. *Strange pro Kynaston.*

The spiritual
court may award
a commission of
appraisement be-
fore granting ad-
ministration
with the will
annexed.

2 Kely. 339.
2 Barnard. 334.
3 Bac. Abr. 535.
S. C.

[*957]

Ante 857

Ruding *vers.* Newell.

IN an action for a false return to a *mandamus*, the question
was, whether the office of register to the archdeacon had
been usually granted for three lives. And in order to prove the
usage, it was offered to be given in evidence, that other arch-
deacons in the same diocese had made grants for three lives, as
the plaintiff's grant was. But the Chief Justice refused to ad-
mit this evidence; and compared it to the case of customary
manors, where the customs of other manors are never allowed,
except in the North of England, where they are considered as
border laws, and an evidence of the law of the country (1).

Customs in other
manors or arch-
deacons not to
be given in evi-
dence.

Ante 66a. and
the cases cited in
the note.

(1) See *Furneaux v. Hitchens*, Cowp. 897.

Darby *vers.* Wilkins.

Money due by first instalment may be brought in, but not to stay the plaintiff from signing his judgment.

[958]

Ante §14.

A Bond was conditioned to pay 100*l.* by several instalments; and the first payment not being made, the bond was put in suit. The defendant before judgment moved to bring in the first payment with interest and costs; which the plaintiff was willing to accept, but insisted, that as the bond was forfeited, he had a right to sign his judgment; and submitted to be bound by rule, not to take execution for more than was at present due, till another payment should accrue. The defendant on the other hand insisted, that by 4 *Ann. c. 16.* he was at liberty to bring in the money at any time pending the action. *Sed per curiam,* That plainly relates to the case of bringing in all the money reserved by the condition, because it says the bond shall be absolutely discharged. However within the equity of that statute it has been allowed to bring in the money due on the instalments. But then it is reasonable, we should take care not to prejudice the plaintiff, who will have a legal advantage by signing judgment. Therefore let him sign his judgment (1), but not to take out execution, until the payments become due.

N. B. Mich. 11 Geo. 2. Lucas v. London, Held, paying all the past instalments with interest and costs, sufficient; and money not yet due, ordered out of court, to the party who brought it in.

(1) *Moss, administrator, v. Hardy, Barnes 288. videtur contra.*

Gore *vers.* Gore.

What a good executory devise.
2 Will. Rep. 28.
16 Mod. 501.
9 Mod. 4.
2 Kel. 254.
2 Barn. K. B.
209. 229. 355.
2 Eq. Ca. Ab.
339. pl. 12.

A Case was sent from Chancery to the King's Bench, where in it was stated, that *William Gore* being seised in fee, devised to trustees and their heirs, to the use of the trustees for 500 years, to raise younger childrens' fortunes and pay debts (1), and after the determination of that estate, then to the first and every other son of *Thomas Gore*, the devisor's eldest son, in tail male, remainder to *Edward Gore* his second son (and in being) in tail male, with remainders over. That at the death of the devisor, *Thomas Gore* had no son, but since his decease the defendant was born. And upon this the question was, whether the first son of *Thomas Gore* could take this estate by way of ex-

(1) There was also a trust to pay an annuity of 50*l.* to *T. G.* for life.

ecutory

executory devise; for it was agreed, it could not enure to him by way of contingent remainder, there being no estate of freehold to support it.

This case was argued in Chief Justice *Pratt's* time at his chamber before him and the three Judges. And they certified their opinions to Lord *Macclesfield*, that it was not a good executory devise, because it might subsist forty weeks after the death of *Thomas Gore*, and they were not for going a day farther than a life in being (2).

For the arguments
of all the counsel
see 2 *Kel.* 254.
pl. 203.
See also 2 *P.*
Wms. 28.

The Chancellor not being satisfied with this opinion, refused to decree accordingly. And he being succeeded by Lord *King*, the case was sent back to *B. R.* (3). And now they were unanimously of opinion; that it was a good executory devise, and that a convenient time after the life was to be allowed, according to the case of *Lloyd v. Cary*, in *Show. Parl. Cases* (4). And this necessarily being to arise within nine months after the death of *Thomas*, there was no danger of a perpetuity. And this being certified, the cause was set down before Lord *Talbot* after *Trinity* term 1734 (a), who declared his agreeing in opinion with the last certificate, and made his decree accordingly (5).

(a) 8 *Vin. Abr.*
tit. Devise,
(U. 6.) 370. n.

(2) The ground upon which this opinion of its not being a good executory devise was founded, is stated in *P. Wms.* 63. to be, "that it was not to take place till after the determination of 500 years. *Vide* also 2 *Kely.* 256, 257. *Fearne on Cont. Rem.* 3 ed. 315, 316.

(3) *Vide Utterton v. Vernon*, 3 *Term Rep.* 539. 4 *Term Rep.* 570. where this was done likewise.

(4) Lord *Raymond* was also of this opinion. 2 *P. Wms.* 62. 2 *Kel.* 257.

(5) An executory devise limited to take effect within 21 years after a life or lives in being, is good. 2 *Black. Com.* 174. *Vide Fearne's Essay on Contingent Remainders*, 3 ed. 318. 406. *Doe v. Fonnereau*, and the notes, *Doug.* 487. 1 *P. Wms.* 98. *Coxe's* edition, for the several cases and distinctions upon this subject.

Hilary Term

7 Georgii 2 Regis. In B. R.

Philip Lord Hardwicke, *Lord Chief Justice.*

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

William Lee, *Esq;*

} *Justices.*

John Willes, *Esq;* *Attorney General.*

Dudley Ryder, *Esq;* *Solicitor General.*

Desbordes vers. Horley.

Upon what bonds
bail is required
on error.

2 Barn. B. R.

389.

2 Kely. 181.

3. C.

THE condition of a bond was for the payment of 500*l.* at such a day, being the same sum mentioned in certain indentures of such a date. And error being brought, the plaintiff in error would have been excused from giving bail, because the words of 3 *Jac.* 1. *c.* 8. are, *bonds for payment of money only*, whereas this was rather a bond for performance of covenants. But the court held, that bail ought to be given; for the material part of the condition was the payment of 500*l.* and the other words were only added to shew they were not distinct debts, but only different securities for the same. *Ante* 476. *Thrale v. Vaughan*, *post.* 1190.

Jefferies *vers.* Dyson. At Guildhall.

IN trespass for *mesne* profits, the plaintiff offered a recovery in ejectment against the casual ejector, upon which no writ of possession had issued. And when the defendant would have gone into the title, insisted he was estopped by the judgment. But the Chief Justice held, that though it would have been an estoppel, if the present defendant had been made a defendant in the ejectment, and the verdict against him; yet this judgment, to which he was no party or privy, could be none; and therefore admitted the defendant to controvert the title (1).

Where judgment is against the casual ejector, the title may be gone into in action for *mesne* profits.

(1) *Sed vide Decosta v. Atkins*, a time longer than what is contained in the demise. *Bull. L. N. P. 87*. See also *Astin v. Parkin*, 2 *Burr.* 665. *Barnes* 472. *Bull. L. N. P. 87. S. C.*

Law *vers.* Law.

DEBT upon a bond conditioned for payment of money at a future day. The defendant pleaded payment at the day: and before the plaintiff replied, moved to withdraw this plea, and plead the statute of 5 E. 6. c. 16. Against the sale of offices. *Sed per curiam*, That is never done, but in order to plead the general issue; not to substitute one special plea in the room of another. So the motion was denied (1). *Vide Trin. 5 Geo. 2. (ante 906. Meard v. Philips)* where the general issue was waived, and leave given to plead double.

Cannot withdraw special plea, but in order to plead the general issue. 2 *Barn. B. R.* 390, 401. 2 *Kely.* 181. pl. 148. *S. C.*

(1) *Hare v. Lloyd*, 1 *Term Reps* 693. *Prout v. Dewar*, *ib. n.* *Cockran v. Robertson*, *id. ib.*

Clews *vers.* Bathurst. At Nisi prius in Midd.

ACTION for maliciously procuring the plaintiff's wife to exhibit articles of the peace against him, and for living with her in adultery. The plaintiff proved a marriage, by the parson and a woman, and also the consummation. To encounter which, the defendant produced a sentence of the consistory court of London in a cause of jactitation of marriage brought by the woman against the plaintiff, wherein she was declared free

Sentence in a cause of marriage conclusive evidence. *Ann.* 11. 18. 145. *S. C.*

from all contract, and perpetual silence imposed upon the plaintiff. Which sentence was pronounced since issue joined in this cause. And the Chief Justice ruled this to be conclusive evidence, till reversed by appeal. And the plaintiff was called. And a few days afterwards at *Guildhall*, in another cause, between

[961]

Dacosta and Villa Real.

WHICH was an action upon a contract of marriage *per verba de futuro*, brought by the gentleman against the lady, who pleaded *non assumpsit*. When the plaintiff had opened his case, the defendant offered in evidence a sentence of the spiritual court in a cause of contract, where the Judge had pronounced against the suit for a solemnization in the face of the church, and declared Mrs. *Villa Real* free from all contract. And the Chief Justice held this to be proper and conclusive evidence on *non assumpsit*; that it was a cause within their jurisdiction, though the contract was *per verba de futuro*, and though the suit there is *diverso intuitu*, being for a specifick performance, as far as admonition will go, and this for damages. Yet Contract or No contract is the point in issue in both. And the plaintiff was nonsuit.

M. 11 Geo. 2.
in C. B. Prudam
v. Phillips, the
Chief Justice held
such a sentence
conclusive, and
would not receive
evidence of fraud
or collusion in ob-
taining it.
Vide a note of
this case Amb.
763.
Harg. Tracts
456.

The cases cited were, *Salk.* 437. 290. 6 *Mod.* 155. *Carth.* 225. 7 *Ed.* 2. 223. 2 *Lev.* 15. 4 *Co.* *Bunton's* case; and *Burroughs v. Femino in Cane* (ante 733.) and *Hatfield v. Hatfield* in the House of Lords in 1725, where on an appeal from *Ireland* the case was, that a woman brought a bill against her supposed husband's son by a former wife: he insisted she never was married to his father, but to one *Porter*, whose marriage with her was proved, and a release from him. She upon this sued *Porter* in the spiritual court in a jactitation cause, and obtained sentence against him, and then made that her case in Chancery, where it was held to be conclusive evidence. And the opinion was affirmed here upon appeal (1).

(1) In addition to these cases
vide *Rex v. Vincent*, ante 481.
Dutchess of Kingston's case, Amb.
756. and the cases there cited
Brownswold v. Edwards, 2 *Vez.*
243. But to be conclusive,
the matter of it must be deter-
mined *ex directo*, *Robin's* case, in
C. B. 1760. Bull. L. N. P. 244.
et seq. *Robins v. Crutchley*, 2 *Wils.*
122. 127. *Cross v. Saltern*, 3
Term Rep. 639. *Hilliard's* case,
Cas. temp. Hard. 312.

Morse *vers.* Roach et al'. In Canc.

BEFORE the year 1718 the method was to deliver out a will of land to be proved at trials, or on commissions, upon security. Since that, the registers have refused to deliver out the will, but insist upon being paid for attending with it; and where it was wanted at a distance, their demands run very high. In this cause an order was made (upon producing three precedents) that it should be delivered out on security; it being a bill brought by creditors and legatees, who were not likely to suppress it (1).

Spiritual court
obliged to deliver
out will of land
on security.

(1) *Frederick v. Aynscombe*, 1 Atk. 627. S. P.Forster *vers.* Graham.

[962]

ERROR of a judgment in *B. R.* in Ireland in an ejectment there brought on the demise of *Arthur Earl of Anglesey* for lands in the county of *Meath*, and upon Not guilty pleaded a trial at bar is had, and the jury find this special verdict.

Construction
upon a power to
make leases.
2 Barn. B. R.
341. 428. S. C.

That 13 May 1701, *James* late Earl of *Anglesey* was seised in fee of the premises in question, and being so seised, he on 14 May 1701, made his will in writing, whereby he devised all his lands in Ireland to *John Lord Haversham*, *Arthur Annesley* his brother, and Mr. *J. Coote*, and their heirs, in trust for payment of his debts, and after payment thereof, then in trust for *Arthur Annesley* for life, and after his decease in trust for and to the use of his first and every other son in tail male, and for want of such issue then in trust for *Richard Lord Altham* his uncle for life, remainder to his first and every other son in tail male; and for want of such issue then in trust for and to the use of *Charles Annesley* his uncle for life, remainder to his first and other sons in tail male; remainder to his own right heirs. Then he appoints the trustees, towards raising money to pay debts, to let the premises for thirty-one years in possession and reversion, reserving the best yearly rent; and that after payment of his debts, whoever should become seised of the premises by virtue of his will, might make a thirty-one years lease, reserving the best yearly rent. Then they find, that *Richard Lord Altham* died in the life-time of the devisor, who 23 November 1701, made a codicil, wherein he recites his will, and a design to alter some part thereof, and that the codicil shall be taken as part of his will; and declares he does not intend to alter his will, except in

[963]

the particulars expressed, but the same should remain in all other respects. Then he devises his lands in *England* and *Wales* to the former trustees, for payment of debts, and afterwards to the use of *Arthur Annesley* for life, remainder to his first and other sons in tail male, the remainder to go to such persons, and with such powers, as by my will are devised. And as to his lands in the county of *Meath*, he devises to them to *Arthur Lord Altham* for life, and after his decease to his first and other sons in tail male, remainder to the daughters of *Lord Altham*, and for want of any issue, to his brother *Annesley* for life, remainder to his first and other sons in tail male, and for want of such issue, the remainder to go to the same persons, and with and under the same powers, as my said other estate devised to him as aforesaid is appointed to go. He further appoints, that *Lord Altham* should enjoy free from his Countess's jointure; and if affected thereby, he appoints other estates to be a satisfaction. And then having republished his will, he died 18 *January* 1701. That upon his death *Arthur Lord Altham*, the son of *Richard* in the will named, entered and was seised, prout *lex postulat*, and being so seised, 27 *August* 1708, by indenture demised the premises to *Andrew Caldwell* for thirty-one years at 60*l. per annum*, which was the best yearly rent that could be got; that *Caldwell* entered and was possessed, and 1 *December* 1727, *Arthur Lord Altham* died without issue, and that the lessor of the plaintiff is the person called *Arthur Annesley* in the will and codicil, and that he entered and made the lease to the plaintiff, who entered and was possessed, till ejected by the defendant. But whether by the will and codicil *Arthur Lord Altham* had power to make the lease for thirty-one years, to continue in force after his death, is the doubt of the jury, on which they pray the advice of the court. And if he had such power, they find for the defendant; if not, for the plaintiff.

After several arguments in *Ireland* the court was of opinion, that *Lord Altham* had power to make the lease to continue after his death, and consequently gave judgment for the defendant, And error being brought in *B. R. in England*, the general errors are assigned, and in *nullo est erratum* pleaded.

Fazakerley pro quer' in errore argued, that *Lord Altham* being a bare tenant for life, could make no such lease, without express words giving him such a power. And that the court was not to consider the reasonableness of the power, but whether in fact it is given to him. However this might be upon the will, where the power is generally given to all who shall become seised; yet this must be considered upon the codicil, in which he makes an end of the provision he intended for *Lord Altham* and his issue male

male and female, and goes on to limit the estate to other branches, before he makes any mention of the power. And when he takes notice of it, it is by adding it to the last remainder.

As it stood upon the will, he made his brother the first taker, and therefore might think proper to give him the power; but he might not care to intrust it with Lord *Altham*, when by the codicil he puts his own brother behind him: and the changing his place, by making him the first taker, was a sufficient benefit, without addition of the power.

That these powers are to be construed strictly, being clogs upon the remainder-men, and finally upon the right heirs of the deviser. He therefore contended that the lease fell with Lord *Altham*, who died in *December 1727*, by which the estate came clear to the lessor of the plaintiff, and that the judgment against him was erroneous, and ought to be reversed.

[964]

Strange contra argued, that the judgment in *Ireland* is right and ought to be affirmed:

The question upon which this is to turn, is stated in the conclusion of the special verdict, and is, whether the lease for thirty-one years made by *Arthur Lord Altham*, reserving the best improved rent that could be got, has in law any continuance after his death.

And this depends upon the construction of the will and codicil together, by which I shall insist, first, that it appears to be the intent of the deviser, to give him a power to make such lease. And secondly, that he has used words proper for that purpose.

On the one hand I admit, that barely as tenant for life he could have no such power, but we must look for it in the will or codicil. And on the other hand it must be admitted to me, that they both make but one will, and so the deviser has declared.

By the will (which takes in all the *Irish* estate) the deviser limits the premises, after payment of debts, to his brother *Arthur* for life, remainder to his sons in tail male, remainder to *Richard Lord Altham* (the father of him who made the lease) for life, with remainder to his issue male, and for want of such issue to his uncle *Charles Annesley* for life, and after his decease to his sons in tail male, remainder to the right heirs of the deviser.

And

And then come the words of the power, that whoever should become seised of the premisses, might make a thirty-one years lease, reserving the best improved rent.

As it stands therefore upon the will, it is plain he intended to exclude no one who should be seised from this power of making leases, but gives it as well to the tenants for life as their issue in tail. And it is not a power personal to the devisees named, but a power that is to run with the land, in whose hands soever it should come. Thus it stands upon the will.

[965]

Consider what alteration is made by the codicil. By that it is plain he intended a benefit to Lord *Altham*, and not to abridge his power. For whereas by the will he could take only in remainder after the life estate of the present earl, and the extinction of an estate in tail male in his issue: he now makes him the first taker of this part of the *Irisb* estate, and devises the same to him in possession. He exonerates this estate from the payment of debts, to which it was subject by the will: and appoints satisfaction to be made out of his other estate, if his lady's jointure should affect this. He likewise gives this estate to the issue female of Lord *Altham*, which is more than he did even for his own brother, or any body else. From all which it is natural to imagine, he did not intend to extinguish this power as to the first devisees and their issue, and leave it only in *Charles Annesley* his uncle, who can claim only under a remote remainder.

And to support such a construction, one would be led to expect an express extinguishment of the power. But of this there is no pretence. All that is contended for is, that he has omitted it in the first part of the clause, which devises it to Lord *Altham* and his issue and to the present earl and his issue male; and has introduced it only at last, where he refers for the subsequent remainders to what is contained in his will, which persons are to take the estate with and under the powers in the will. But as this is very unnatural and absurd, so it is directly contrary to the words, and the legal and natural construction of them. He introduces the codicil, with declaring that his will shall stand in all particulars, not altered by the codicil. He ratifies and confirms the unaltered parts, and republishes his will, subject only to the alterations. So that as he only transposes the place of Lord *Altham*, and makes him to take in possession instead of remainder, I apprehend the power would have subsisted in him, if there had been no notice taken of it in the codicil. For otherwise his will does not stand as to all the particulars unaltered by the codicil. But so far is he from designing to take away the power,

power, that he takes notice of it in every part of the codicil, and even extends it to lands that were not comprized in his will, which are the lands in *England* and *Wales*. Those he limits to the present earl and his issue, 'and for want thereof, the remainder to go to such persons, and with such powers, as are mentioned in his will.' He adds the same words to the devise of the *Kildare* estate, and likewise to the devise of the premises in question.

The plain meaning of the words, is this, •

'Whereas by the will I have appointed *A.* to take before *B.* I now appoint *B.* to take before *A.* with remainder to *C.* as before, and under the same power.' Which words *with and under the same power*, must in construction extend to the whole, according to several authorities. 1 *Sid.* 312. *Ferrers v. Newton*, it is there laid down as a general rule, 'that words in the beginning or end of the sentence run through the whole and govern all, but the words in the middle refer *ad media tantum*:' as if a lease for life be made to *A.* remainder to *B.* for life, rendering rent, the reservation extends to both; but if it had been to *A.* for life rendering rent, remainder to *B.* the reservation would not have extended to the last. The same rule is likewise laid down in 1 *Sid.* 328. 1 *Saund.* 58. and *Hob.* 276. So in 10 *Co.* 106. *Humphrey Loffield's* case, *A.* demised to *B.* a cellar for one year, and if 'at the end of the year both parties should be willing to continue it for any longer time, then *B.* was to hold over for the term of three years then next following, rendering to *A.* 40*s.* yearly during the term. It was objected in an action for the first year's rent, that the reservation was only for the contingent interest of three years, and neither party had suffered that to arise; and it was only during the said term in the singular number, which could refer only to the last antecedent, which was the term of three years. But the court held, that the reservation went to the whole, and the proper place of it was after the limitation of all the estates. And therefore if a man lets lands to *A.* for life, remainder to *B.* and the heirs of his body, and for default of such issue remainder to *D.* in tail, or for life, rendering rent, this reservation shall extend to all the estates before.

[966]

In the case at bar the words are used at the close of the sentence to this effect, 'I give my estate in *Meath* to Lord *Altham* for life, remainder to his first and other sons, remainder to *B.* in tail, remainder to *C.* with a power to make leases for thirty-one years.' Which last words, according to the authorities cited, will extend the power to every one of the estates.

It

It is observable, that in the devise of the *Meath* estate, he has used a word with regard to the power, that he has not used as to the *Engliff* or *Kildare* estate, and that is the word *under*: He gives *those* estates to the remainder-man *with* the power of making leases; but *this* is given to the remainder-man *with* and *under* such a power. The construction of which is, that he shall have the estate *with* the power to exercise it himself, and *under* and *subject* to the exercise of it by those who went before.

I can by no means admit this to be a power that prejudices the remainder-man; I rather take it to be for his benefit, there being no room to take a fine, but a direction to reserve the best improved rent; and tenants for a certain term of years are more likely to keep the estate in heart, than where their interest depends on another's life.

[967]

What therefore we must insist upon is, that the power is well raised by the will, and must subsist, if not extinguished by the codicil; that the codicil is so far from extinguishing, that it takes notice of, and confirms it: and that it is absurd, and contrary to the plain intention of the deviser, to say, that Lord *Altham*, his own brother, the lessor of the plaintiff, and their issue (for whom he has shewn the greatest regard by placing them first in his will) shall have no power, and that it subsists only for the benefit of *Charles Annesley* the most remote remainder man in the will.

Et per curiam, We must take the will and codicil together, and upon both it is plain he only intended to alter the order of taking, and to exonerate this estate from the debts, to which it was subjected by the will. There is no necessity to confine this power to the last remainder man, especially as the word *under* is used with regard to these lands and no other.

An *ulterius concilium* was granted. But no body appearing on the part of the plaintiff in error, to argue it: the judgment was afterwards affirmed without further debate.

Easter Term

7 Georgii 2. Regis. In B. R.

Philip Lord Hardwicke, Lord Chief Justice.

Sir Francis Page, Knt.

Sir Edmund Probyn, Knt.

William Lee, Esq;

John Willes, Esq; Attorney General.

Dudley Ryder, Esq; Solicitor General.

}

Justices.

Dominus Rex *vers.* Gibson.

THE defendant was convicted of forgery, and would have moved for a new trial, without appearing in court; insisting that this differed from a motion in arrest of judgment. But the court held there was no difference; for the verdict fixes such a presumption of guilt, that the court will be sure of him, before they intimate any opinion: and even when the verdict was brought in would have committed him, had he staid in court. And the Chief Justice mentioned the cases of *Regina v. Ridpath*, *Psch.* 12 *Ann.* and *Rex v. Lunt et Wombwell* in perjury, where the distinction now taken was over-ruled.

Defendant after conviction must be in court to move for a new trial.

1 Sess. Ca. p. 428. No. 335.
2 Barn. B. R. 412. 418.
Cunn. 29. S. G. Ante 844.

Day & al' *vers.* Searle.*

THE mariners libelled on a contract under seal, and a prohibition was granted, on the authority of *Salk.* 31 (1).
Vide 3 *Lev.* 60. *contra.*

Where the contract is under seal, mariners cannot sue in admiralty.

2 Barn. B. R. 419.
Cunn. 32. S. G.

(1) *Howe v. Napier*, 4 *Burr.* Parre, 2 *Ld. Raym.* 1209. and 1944. S. P. *Et vide* *Bens v. Menetone v. Gibbons*, 3 *Term Rep.* 267.

* See this case more fully stated in *Abbot on Shipping* Part 4. ch. 4. *Ante* 5. page. 426. 2^d edition.

267. in which case the court held that the admiralty had cognizance of an hypothecation bond given in the course of a voyage, though it was under seal, and executed upon land, *the subject matter being exclusively within the admiralty jurisdiction.*

[969]

Comber *vers.* Hill.

Of cross remain-
ders by implica-
tion.

Caf. temp.
Hardw. 22.
2 Barn. B. R.
367. 443.
2 Kely. 188.
MSS. S. C.

UPON Not guilty in ejectment for the moiety of a house with the appurtenances in *Sussex*, on the demise of *John Jarvis* and *Anne* his wife, the jury find this special verdict.

That *Richard Holden* being seised in fee of the whole premisses, 11 March 1698, duly made his will in writing, whereby he devises the whole premisses to his son *Richard* (after the death of his wife) for life, remainder to his first and every other son and sons in tail male, and for default of such issue to his grandson *Richard Holden the son of Thomas Holden* and to *Elizabeth Holden his granddaughter, equally to be divided, and to the heirs of their respective bodies, and for default of such issue to his granddaughter Anne Holden in fee.* That 25 March 1699, the devisor died seised; that the devisor's wife, *Richard* his son, and *Anne* his wife, and *Elizabeth Holden* the granddaughter, are dead. That *Richard* the son left no issue male, and *Elizabeth* the granddaughter died without issue. That *Richard Holden* the grandson is living. And that 1 March 1723, *Anne* the granddaughter married *John Jarvis* (the lessor) who claiming a moiety in right of his wife, on the death of *Elizabeth*, entred and made the lease to the plaintiff who entred and was possessed, until ejected by the defendant. *Sed utrum, &c. Et si pro quer, pro quer. Et si pro def, pro def.*

This cause was twice argued at the bar upon the question, whether any cross remainders were created by this will, and this term the Chief Justice delivered the resolution of the court.

The general question in this case is, in whom the moiety devised to *Elizabeth* the granddaughter vested on her death without issue. Whether in *Richard* the grandson, the other devisee in tail, or in *Anne* the granddaughter under her remainder in fee. Or in other words, whether any cross remainders are created by this will. If there are, it will be with the defendant; if not with the plaintiff. And we are all of opinion, that no cross remainders can arise upon this will; but the moiety of *Elizabeth* goes over to her sister *Anne*.

To make cross remainders in any case, there should be either express words, or a strong necessary implication. For the first

of these, I do not find it was insisted on at the bar, that there are any express words; all they contended for on the part of the defendant was, to bring it under the other head of a necessary implication. This necessary implication must arise from words that denote the plain intent of the deviser, and that cannot be satisfied without such a construction; for if it stands in different, we cannot raise cross remainders by conjecture (1).

The doubt here arises on the words, 'and for default of such issue' (2), which being relative, we must see what goes before: those words are, 'to my two grandchildren Richard and Elizabeth equally to be divided, and to the heirs of their respective bodies.' (3); now the word *respective* is what *such* may very naturally refer to: and then it runs, I give one half to my grandson, and the other to my granddaughter, and for default of issue respectively I give the same to Anne, i. e. the same respective part that the person dying was seised of: otherwise the word *respective* must be rejected: where as it stands in this will, it will have the same operation, as if the devises had been by separate clauses.

(1) *Vide Parry v. White, Cowp. 771.*

(2) Anciently the law was, that cross remainders could not be raised in a will between more than two, without express words. *Gilbert v. Whitty, 2 Cro. 655.* But the rule is now established, that wherever cross remainders are to be raised between more than two, without express words, the presumption is in favour of them; where they are to be raised between more than two, it is against them. But that presumption may be answered by circumstances of plain and manifest intention in another way. This intent therefore must be collected from an examination of the particular circumstances of each particular will. These words "in default of such issue," have been held to raise cross remainders in *Phippard v. Mansfield, Cowp. 799.* *Albion v. Pye, 4 Term Rep. 711.* *Wright v. Halford, Cowp. 31.* Rep. by the name of *Wright v. Englefield, Amb. 458.* *Wright v. Lord Cadogan, 6 Bro. P. C. 156.* *Holmes v. Wileet, 1 Freem. 483.* and *Dyer 303, pl. 49.* Two cases of *Miller v. Moore, 17.0.* and *Doe ex dem Burden v. Burville,* have also been cited as settling the rule respecting cross remainders. *Cowp. 31.* *Doug. 53. n.* but I have not been able to procure a note of them. See also *Doe v. Wainwright, 5 Term Rep. 427.* Cross remainders cannot be raised by implication in a deed. *Doe ex dem. Tanner v. Darvell, 5 Term Rep. 518.*

But it is otherwise in executory articles. *Twiden v. Lock, Amb. 663.*

(3) The words "several or respective," in the disjunctive title, prevent the implication of cross remainders unless the intention to raise them is otherwise very strongly manifested. *Vide Williams v. Brown, post.*

996. *Davenport v. Oldys, 1 Atk. 579.* and the ground of that opinion as reported by Lord Mansfield, in *Phippard v. Mansfield Cowp. 799.* See also *Murray v. Townly, 1 Ves. 102.*

In *Leach v. Jackson et al coram Lord Apsley, Trin Term 11 Geo. 3. in Chancery, R. Hawes devised to his six nieces to be equally divided between them share and share alike as tenants in common, &c. and of the several and respective heirs of the body and bodies of all such and every my said six nieces, and in case one or more of my said six nieces shall happen to die without issue of her or their bodies, then I give, &c. the share or shares of her or them so dying without issue to the survivor or survivors of them my said six nieces share and share alike as tenants in common, &c. and to the several and respective heirs of the body and bodies of such survivor or survivors of them, and if all my said six nieces shall die without issue, then I give, &c. all the same manors, &c. unto my own right heirs forever. Three of the nieces died without issue. I was admitted that the original share went to the survivors by way of cross remainders, but it was insisted that the shares which the two last dying nieces took by way of accretion did not survive. MSS.*

Articles upon a marriage to lay out the wife's fortune in lands. To the use of all the children of the marriage as tenants in common and of their respective heirs, and for default of such children and their issue to the use of the survivor of the husband and wife. Lord Camden held there were cross remainders.—*Twiden v. Birt, after Hil. Term 1763, in Chanc. MSS.* *Vide S C Rep. Amb. 663.* by the name of *Twiden v. Lock.*

The devisor was thinking it improper to divide this house between three; therefore he takes care, that but two grandchildren shall take together; so that letting in *Anne* on the death of either, makes no more splitting than he allowed at first. This is a circumstance arising on the face of the will, where he calls them all grandchildren: and these arguments from the relation the devisees stood under to the devisor have always been thought of weight.

This case materially differs from the case of *Holmes v. Mayne* relied on by the defendant. That case is reported in *Poll.* 425. *Sir T. Jones* 172. *Raym.* 452. and *Skin.* 17. and was thus. *A.* devised to his two daughters and their heirs, equally to be divided between them; and in case they happen to die without issue, then I give *all* the said lands to my nephew. And it was held, that the nephew could not take until both sisters were dead without issue, and that there should be cross remainders. This case must be taken for law; but unless cross remainders were raised, the intent must fail, and material words be rejected. For, first, it was not his intent to provide for his nephew, while there was any issue of either of his daughters: he was not so near to him, and it would be an unnatural construction, to carry the estate from his own issue to him, which was much relied upon. Secondly, it is if they die without issue, *i. e.* if *both* die: and that is *Raymond's* construction of the word *they*, to which the rest agreed. Thirdly, it is *all* the said lands, which shews he intended all should go together: and it was absurd to imagine that the death of one daughter should carry the estate from the other, even her own moiety; which must have been the case, if the nephew took upon the death of either.

[971]

So in the case cited from 4 *Leon.* 14. of a devise to two sons in tail; and if any of my sons die without issue, then the whole land shall go to a stranger in fee. There was the unnaturalness of giving the estate from his own children, and the word *whole* could not be used without raising cross remainders. Upon the whole the plaintiff must have judgment.

Kent *vers.* Kent.

Where there are two tenants to the writ in dower and one dies after judgment

THIS was a writ of error from *Ireland* upon a special verdict in dower, arising upon the construction of an *Irish* act of Parliament of no consequence to be understood here: but for damages, and his heir and the other bring error, the whole of the original damages should be recovered against the survivor. But the value from the time of the judgment to the affirmance cannot be recovered against the surviving plaintiff in error only. And the court cannot compute such value after the rate of the damages found by the first jury, but should award a writ of enquiry. But although such judgment is for the benefit of the heir of the deceased tenant, yet he may join in the writ and assign it for error. *Cal. temp. Hardw.* 50. 2 Barn. B. R. 357, 386, 441. 2 Kely. 194. cited *And.* 154. S. C. besides

besides the argument upon the merits, there were several exceptions taken to the record, all of which (except one) were overruled. And as to that which was allowed, it may be shortly stated by way of case.

There were two tenants to the writ of dower, *Edward May* and *Robert Kent*: the demandant has judgment to recover her dower and 158*l.* for damages and costs. They both bring error, and assign errors, and then *Edward May* dies, and there is judgment to abate the writ of error. After which *Kent* and *Robert May* the heir of *Edward* bring a new writ of error; and the judgment is affirmed *in toto*; and a writ of seisin awarded for the dower against both, and execution for the damages and costs against *Kent* only, and also for the value from the time of the judgment according to the former computation.

To this exception was taken, that *Kent* alone ought not to be charged; for the statute subjects, not only the tenant in the action, but also those who join in the writ of error, as being bound by the judgment.

And after consideration the Chief Justice delivered the opinion of the court upon this point.

We are all of opinion that as to damages from the time of the judgment in *C. B.* to the affirmance in *B. R.* in *Ireland*, the judgment is erroneous, and ought to be reversed.

We have no doubt but that the King's Bench might award damages from the time of the judgment to the affirmance. But the objections are to the manner of doing it, and they are two. 1. That they have computed it according to the value found by the first jury, whereas there ought to have been a writ of inquiry. And, 2. Because they have awarded them against *Kent* only.

As to the first: This power of awarding damages on the writ of error is not founded on the statute of *Merton*, for that does not enable the courts to go farther than the effectual judgment to recover seisin in the court where the writ is brought. This gave occasion to make the statute 16 & 17 *Car. 2. c. 8.* which is enacted in *Ireland* the next year; and thereby power is given to the court to which the cause is removed by writ of error, to award an inquiry of the value of the *mesne* profits after the first judgment in dower, and upon return thereof to award an execution.

[972]

It may be said that the annual value is ascertained by the first jury, therefore it is a mere matter of computation, which the

court may make without a writ of inquiry. To this I answer, that the statute is introductive of a new law, and therefore the method therein prescribed must be observed: besides, as the time for which they are given is different, the value might be so too; and that was the reason why the former computation was not allowed to be the rule. The statute of *Merton* does not require a writ of inquiry, as this of *Car. 2.* does: and therefore the jury who try any collateral issue, inquire of the value at the same time upon the statute of *Merton*; and no inconvenience can arise, because they are assessed by a jury either way: but where the value is omitted to be inquired of, or the judgment is upon a demurrer, there is a necessity for a writ of inquiry. *Rastal* 230. *a. Saund.* 335. *Lutw.* 719. And agreeable to this is the case of *Worden v. Worden*, entered in *B. R. Pasch. 3 W. & M. rot.* 393. where the value was omitted to be inquired of below, and a writ of inquiry was awarded by this court.

And as it was wrong in this case to assess the damages without an inquiry; so, 2. was it to lay the whole upon *Kent*.

As to the damages during their joint lives, they must be considered as joint trespassers, and then the heir is not chargeable, but the whole damages may be levied on the survivor. But for the time the heir was in possession, he was equally a trespasser with *Kent*, and as such equally liable to make satisfaction. Could he maintain this writ of error without entering into a recognizance? Certainly he could not. And has not he thereby subjected himself as much as the other has done?

[973]

Ante 892.

But then taking it to be wrong in both particulars, an objection is made, that this being for the benefit of the heir he cannot assign this for error, though *Kent* may. And to be sure the general rule is, that a man shall not assign matter for his own advantage, but he ought to be severed from the defendant who is hurt. *Cro. Eliz.* 891, 1 *Saund.* 239. *Yelv.* 3. *Cro. Jac.* 92. But we think that was not necessary here, it being the fault of the court, and differs from the case of too long an essoin which is prayed by the party. 8 *Co. Beecher's case.* 2 *Saund.* 49. 1 *Roll. Abr.* 759. *Y.* 2.

Ante 129, 303,
934-1.

This part of the judgment therefore being wrong, and the error well assigned, it must be reversed as to this part only, and

(1) *Green v. Waller*, 2 *Lord Chilton*, 4 *Burr.* 2015. *Hancok v. Reym.* 891. See also *Knox v. v. Haywood*, 3 *Term Rep.* 435. *Cajiao*, 3 *Burr.* 1791. *Heath v.*

the other being a distinct judgment may be affirmed. *Salk.* 24. To this we think proper to add, that we are also to do what the court below should have done; which is to direct them to award a writ of inquiry, for we cannot do it ourselves, as we should have done in an *English* cause, since it must go to a sheriff out of our power. But we remit the record with an affirmance of one part, and reversal of the other, with a command to *B. R.* in *Ireland*, to award a writ of inquiry, and upon return thereof to do what by law appertains thereto.

Cro. Jac. 206,
534.
Carth. 180.
Cro. Car. 511.

Cary vers. Hinton.

TRESPASS for breaking and entering his close, and treading down the grass. The defendant pleads; that the *locus in quo* was his proper lands. To which the plaintiff replies, that it was the estate of inheritance and the proper lands of the plaintiff, and not the proper lands of the defendant; upon which issue is joined, and a verdict for the plaintiff.

Informal issue
cured by a ver-
dict.
2 *Kely.* 153,
2 *Barn.* 363,
436, 449. *S. C.*
Vide 5 *Com.*
Dig. Pleader.
(*R.* 18.) 511,
(*S.* 47.) 537.

Ketelbey moved in arrest of judgment, that this was an immaterial issue, for this is a possessory action; and the plaintiff may have the inheritance in him, and yet not be in possession.

Strange contra insisted, that it was but an informal issue, and had the pleadings been in *Latin* it would have been the common plea of *liberum tenementum*, as it was intended to be by this translation. The question between the parties is, to whom this close belongs, and the jury have found it belongs to the plaintiff. And though I admit this replication and plea would both have been ill on demurrer; yet after a verdict it is well enough; and he cited 2 *Bulst.* 41. 5 *Co.* 43. *Salk.* 365. *Yelv.* 227. and *Trin.* 1 *Geo.* 1. *B. R.* *Yeatman v. Muston*, where in trespass the defendant pleads, that *A. seifitus fuit* and demised to him, and then prescribes in a *que estate* for a way; and found for the defendant, and held well after verdict: though it was objected, that he might only have an estate for life under *seifitus*, to which no prescription can be annexed.

[974]

Et per curiam, It being found to be the plaintiff's estate of inheritance, we must take it he had the fee, which is the whole interest, and that the defendant had no interest at all. We are not to presume a possession distinct from the fee; and here is enough for us to see where the right of the cause is, and to warrant our judgment for the plaintiff.

Devenish *vers.* Mertins.

Double costs or-
dered by rule.
2 Barn. B. R.
373, 432, 449.
B. L. N. P.
332
2 Kely. 18.
S. C.

Ante 46.
Brayson v.
Crabb.

TRESPASS for taking a gun. And after Not guilty pleaded, the plaintiff moved to discontinue upon payment of costs. The defendant upon affidavit of his being a justice of peace and in the execution of his office, moved for double costs. And the question was, whether it should be done by rule or by suggestion. And upon consideration the court held, that this being a discontinuance with leave of the court obtained by rule, they might make this a part of the terms. And that differed it from the case of a verdict or nonsuit, where it must be done by way of suggestion (1).

(1) *Anon.* 2 Barnard B. R. 171. it can not be done by suggestion. But after verdict the judge who *Anon.* 2 Vent. 45. *Grindley v.* tried the cause must certify, and *Holloway, Doug.* 294.

Dominus Rex *vers.* Heslop.

There must be a
quorum in an or-
der of bastardy
by borough jus-
tices (1).
1 Sess. Ca. p.
250. no. 199.
2 Barn. B. R.
417, 421.
Foley. 412.
Cun. 31. S. C.

AN order of bastardy made by two justices of the borough of Richmond in Yorkshire was quashed for want of *quorum unus*: though 3 Car. 1. c. 5. was insisted on, where justices in precincts have power to execute the 18 Eliz. c. 3. as justices in the county do; which, *per curiam*, must be in the same manner. *Quare tamen*, for many charters have no *quorum*.

(1) But by 26 Geo. 2. c. 27. no order shall be quashed for this exception.

Wainwright *vers.* Bagshaw.

Where church-
wardens have ac-
counted they
cannot be cited
again.
2 Barn. 421.
Cunn. 33.
Andr. 11. in N.
S. C.

THE church-wardens were cited into the court of *Litchfield* to account: they pleaded, that they had accounted at the vestry according to law; which was rejected: and a prohibition granted, for the ordinary is not to take the account; he can only give a judgment *quod computent*, and to what purpose should they be sent back to those who have taken their account already. The same rule was made in *Seaccario, Pasch.* 2 Geo. 2. between *Haughton et al* church-wardens of St. Alban Woodstreet and *Kendrick et al*; and in the case of the church-wardens of *HammerSmith*,

*HammerSmith, Mich. 1 Geo. 2. * Nutkin v. Robinson: and vide Lutw. 1028. and Prideaux to church-wardens, 103 (1),*

* See Bunb. 247. pl. 318. S. C. S. P. but not S. T. note to a ed.

(1) *Adams v. Rush, post. 1133. Snowden v. Herring, Bunb. 289. S. P.*

Dobbs vers. Passer.

[975]

THE plaintiff signed judgment in ejectment, and before he had lost any trial the defendant applied to set it aside, though strictly regular, upon payment of costs, and taking notice of trial; which the plaintiff refused. And the court being applied to, a distinction was offered between ejectments and all other actions, because the right was not bound, but a new ejectment might be brought. *Sed per curiam*, That distinction held formerly in many instances where it is now exploded, you could not formerly have a new trial as you now may; and great inconveniencies may arise from changing the possession, timber may be felled, &c. and as the Common Pleas makes no difference, and we are got into their way in all other actions, it is proper to do it here too (1).

Regular judgment in ejectment set aside upon payment of costs, and taking short notice of trial. 2 Barn. B. R. 431. S. C.

(1) *Vide Dos ex dem. Troughton v. Roe, 4 Burr. 1996.*

Gammage vers. Watkin.

THE debt was three guineas, but the costs swelled it to 14*l.* 10*s.* for which the plaintiff had judgment, and the defendant brought a writ of error. The plaintiff brought debt upon the judgment, and held the defendant to bail: and now upon motion the proceedings were ordered to stay pending the writ of error, and common bail to be accepted; for as the original demand did not require bail the addition of costs will not alter the case (1).

Where the debt does not require bail, costs will not warrant holding to bail in debt on the judgment.

(1) *Palmer v. Needham, 3 Burr. 2660. Anon. Corp. 128. acc. 1389. Robinson v. Nicholls, post. But in Lewis v. Pottle, 4 Term 1077. Belither v. Gibbs, 4 Burr. Rep. 570. Resolved contra after 2117. Cressy v. Kell, 1 Wils. conference with C. B. 120. Bush v. Bates, 5 Burr.*

Dominus Rex *vers.* Justices of Shrewsbury.

Poor's rate not to
be removed.

1 Sess. Ca. p.

253, no. 201.

Cunn. 28.

2 Barn. B. R.

272,

440, 457-S. C.

Ante 932.

UPON appeal to the sessions the poor's rate was quashed, and the sessions make a new one. To remove which I moved for a *certiorari*, because here we could have no appeal, which was one reason given in the case of *Uttoneter*. But the court said, that was not the only reason they went upon, and denied a *certiorari*.

Burleigh *vers.* Harris.

No writ of error
coram vobis lies
after affirmance.

2 Barn. B. R.

422, 430, 431.

Cunn. 34-S. C.

Ante 949.

[976]

A Judgment was recovered in the *Marshalsea*, and error brought in *B. R.* and error in law assigned, and the judgment affirmed: then a writ of error *coram vobis* was brought, and error in fact assigned; and the court staid proceedings upon it, and gave leave to take out execution. For as error in fact and law cannot be both assigned on one writ, there is no reason to do it by a more dilatory method: and it is like the case of *Lambell v. Prettyjohn* (ante 690.) where it was held that error *coram vobis* would not lie after affirmance in the Exchequer Chamber: besides it would be very odd, that the same court should affirm and reverse. And as to the case in *Salk.* 337. where it is reported to lie after affirmance; that is not warranted by the record, which is entered *Hil.* 3 & 4 *Jae.* 2. rot. 420. by which it appears, the writ of error abated, and there was no affirmance; which is agreeable to 1 *Roll. Abr.* 753. 2. 1.

Dominus Rex *vers.* Ellames.

Amendment.

2 Barn. B. R.

440, 445.

Cal. Temp.

Hard. 42. more

at large and

Cun. 39. verba-

tim in the same.

And. 111. n.

S. C.

INFORMATION in the nature of a *quo warranto* against the defendant, who claimed to be mayor of *Chester*. The defendant justified under a charter and by-law, by which the mayor is to be chosen by all the fellow citizens of the city and of the suburbs and hamlets inhabiting within the same, or a major part of them; and lays his election to be by the majority of the citizens of *Chester*. To this there was a demurrer and joinder in demurrer. And when it came it into the paper, the defendant's counsel perceived, that they had left out those citizens who inhabited within the suburbs and hamlets. Whereupon they moved to amend, and shewed by affidavits, that the prosecutor had not lost a trial, and offered to pay costs, and likewise produced an affidavit, that it was not a voluntary mistake.

And after long debate and many cases cited, the court gave leave to amend, and chiefly for reasons peculiar to this case.

1. Because

1. Because otherwise the office would be lost, without trial of the right (1). 2. This cannot be made use of as a trick to gain time, because of the affidavit made in this case. 3. Here has been no trial lost, so that the prosecutor may still try the merits in time (2). 4. The prosecutor was not driven to demur; for if he had gone to issue, and it had been found with the defendant; yet as a defect of title appears in the plea, he would have been intitled to a judgment of *ouster* *Vide ante* 394, 873 (3).

(1) Plea in *quo warranto* allowed to be amended after issue joined and cause made, a *remanset* by reason of the multiplicity of business though the defendant's office was determined, because the rights of other persons would be affected by the event of the cause. *Rex v. Armstrong*,

And. 109.

(2) *Vide Rex v. Edwards, And.* 111. n.

(3) It is laid down by Lord *Hardwicke* in delivering this judgment as reported *Caf. Temp. Hard.* "that amendments at the common law are wholly discretionary."

Trinity Term

* 7 Georgii 2. In B. R.

Philip Lord Hardwicke, *Lord Chief Justice.*

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

William Lee, *Esq;*

} *Justices.*

John Willes, *Esq;* *Attorney General.*

Dudley Ryder, *Esq;* *Solicitor General.*

Cafwell *vers.* Norman.

Where executor
shall pay costs.
2 Barn. B. R.
450.
Cun. 38.
1 H. Black. 567.
a. S. C.

AN executor brought error of a judgment after a *devastavit*, and the court held he ought to pay costs on affirmance (1).

(1) *Vide Saltern v. Wynne*, post. 1072. *Williams et al' Executors v. Ryley*, in *Cam. Scac.* 1 H. Black. 566.

Smith *vers.* Hixon.

The husband
alone may sue
for malicious
prosecution of
the wife *per quod*
he was put to
expence.
Caf. Temp.
Hard. 54.

CASE for maliciously prosecuting the plaintiff and his wife for receiving stolen goods knowing them to be stolen, *per quod* they were both scandalized, and the husband interrupted in his trade, and put to expence. On Not guilty pleaded, the jury find for the defendant as to prosecuting the husband, and for the plaintiff as to the prosecution of the wife. And it was moved in

2 Barn. B. R. 465. Cun. 52. Vide 2 Com. Dig. Baron & Feme. (X.) 107.

arrest of judgment, that what concerns the husband being now out of the case, the wife should have joined in the action as to the matter for which the plaintiff would recover, and the action would survive to her; and they cited *Cro. El.* 884. 1 *Sid.* 5.

* *Sed per curiam*, In *Savil v. Roberts*, (a) *Salk.* 13. it was indeed held, that expence alone without scandal would not be a ground for such an action: but afterwards in the case of *Jones v. Gwynne*, (b) *Hil.* 12 *Ann.* that opinion was exploded. Here it is laid that the husband was put to expence, and this being an action founded upon a tort, the plaintiff was not bound to prove all the declaration, as he is in the case of contracts: and though this action as to the scandal may survive to the wife; yet that is no reason, for he may undoubtedly maintain trespass for beating her *per quod consortium amisit*, and yet no doubt the action for beating will survive. The plaintiff must have judgment.

Brassey et al' verf. Dawson et al'.

IN trover by the plaintiffs as assignees of the effects of *Samuel Fairclough* a bankrupt, a case was made for the opinion of the court.

That the bankrupt was appointed collector of the land-tax for the precinct of *Aldgate* in the city of *London* during the year 1730. That 7 *July* 1731. he committed an act of bankruptcy, having then 90*l.* of the tax in his hands. That 16 *July*, the commissioners of the land-tax issued their warrant, upon which the goods in the declaration were seized the same day. That 17 *July* a commission of bankruptcy issued. That an assignment was made to the plaintiffs on 19 *July*, and that on 22 *July* the defendants took away the goods, and sold them.

Upon this state of the case the general question was, whether the plaintiffs had a property in these goods; for as to a conversion (supposing there was a property) the defendants did not offer to dispute it. This cause was twice argued at the bar, and for the understanding it, I shall give my own argument for the plaintiffs, and the opinion of the court for the defendants.

Strange pro quer'. I shall consider this case two ways, 1. As if it was between private persons; and 2. Whether here is any intervention of the prerogative.

As to the first, To make these goods seizable they must be *his*, i. e. the bankrupt's, at the time of such seizure. They power in

(a) *Rep.* also *Salk.* 16.

5 *Mod.* 394, 405.

Carth. 416.

1 *Ld. Raym.*

374.

12 *Mod.* 208.

Holt 8, 150,

193. *S. C.*

2 *Vin.* 25. pl.

42.

(b) *Salk.* 15.

10 *Mod.* 148

214.

Gillb. 185. *S. C.*

1 *Leon.* 299.

Cro. El. 147,

157, 524.

1 *And.* 48.

[*978]

Land-tax money in the hands of the collector is a debt due to the King.

Where therefore the collector commits an act of bankruptcy on the 7th, and his goods are seized under the warrant of the commissioners for land-tax money the 16th, and a commission issues against him the 17th, the assignment is made the 19th and the goods are sold under the warrant the 22d, trover for the goods will not lie by the assignees without payment or tender of the money due by him. But such warrant binds the goods not from the date but from the time of the seizure.

2 *Barn. B. R.*

342, 382. *Cun.* 265. *Kely.* 290. *S. C.*

3 *Geo.*

[979]

3 Geo. 2. . 25. is, "For the commissioners to seize the estate real and personal of such collector to him belonging." And I shall insist, that on 16 July these goods were not *his*, the act of bankruptcy being stated to have been before. And that though in the case of the crown it has been held, that it is sufficient to come any time before the assignment, and there is no relation to bind the crown; yet in the case of a subject the goods are in the assignee by relation from the act of bankruptcy, and all *mesne* acts will be avoided. *Salk.* 111. And therefore it is constant experience, to over-reach a compleat execution at the suit of a subject, by shewing only an act of bankruptcy before. And 21 Jac. 1. c. 19. supposes so, by providing that the goods shall be equally distributed between the creditors, whereof no execution is served and executed before an act of bankruptcy. So in *Philips v. Thompson*, 3 Lev. 69, 191. where the writ was delivered before, but not executed until after an act of bankruptcy; it was not doubted, but it would have been bad, had the act of bankruptcy been before both. Bankrupts are considered as offenders, who have forfeited their estate, and are not capable of conveying any property: and therefore where after an act of bankruptcy, and before any commission, the bankrupt sells goods; it is in the election of the assignee, to disavow it and bring trover: he may indeed avow it, and sue for the money; but then the bankrupt is not considered as transferring any property of his own, but as acting as servant to the assignee. This shews there is no sort of property remaining in the bankrupt. However it will be sufficient for my purpose, if we only suppose the property to be in abeyance, as in the common case of intestacy before administration; for then the goods were not *his*, and consequently not seizable.

Hussey v. Phillips, 12 W. 3.
Rep. 12 Mod.
324.
Holt 95.
3 *Salk.*, 59.

2. If it would be thus in the case of the subject, let us see if there is any intervention of the prerogative, to give it a different turn. This indeed is the main point between us, for if he is considered as the debtor of the crown, and the warrant of the commissioners to be equal to an extent; I admit it will be against us, and the crown must take, the warrant coming before any assignment. And on the other hand, if the crown is out of the case, I apprehend it will not be disputed, but that the plaintiffs are intitled.

And I shall insist for the plaintiffs, that the collector is not to be considered as the debtor of the crown; but the receiver general is, and so is the division; and there is a plain reason for this distinction: the division is originally charged, and can no way be discharged, but by a payment to the receiver general. The collector is a middle man between them, in whom the crown re-

poses

poses no confidence, and therefore leaves him to be appointed by the division; and at the same time the crown reserves to itself the appointment of the receiver general, as the person by whose acts the crown may be affected. Had the act intended to turn the crown round to a remedy against the collector in the first place; it would only have provided, that what remained after disposal of the collector's effects, shall be levied on the division by a re-assessment. But lest such a construction should be made, there is added an express declaration, that payment to the collector is no discharge to the division, until the money is lodged in the receiver general's hands. The plain import of which is, Let the division take care who they send the money by, for he shall be considered as their agent, and not the crown's. If the crown was in any danger of losing the duty, there might be some colour to set up the prerogative; but here the duty is secured to the crown in all events by assessments and re-assessments. The receiver general is the crown's debtor, because the crown can resort to no one else, when the money is in his hands: but it's being in the collector's hands is a circumstance of no consequence to the crown, or that makes the least alteration. Put the case that I am debtor to the crown, and send my servant to the Exchequer with the money, and he neglects to pay it in; can that servant be said to be the debtor on whom the crown can levy the money? no: the crown considers me as the debtor still, and as the person who is to suffer by the other's neglect. Will any body say, the crown is bound to take the collector for its paymaster? the act provides for the contrary.

[980]

Now if the crown has liberty to avow or disavow the payment to the collector. Then the divisions having once paid the money, and being bound to pay it again, is a bettering the condition of the crown; and no ease, but a load on the division.

There is one thing more to be considered, and that is; supposing the crown has its election, to resort to the collector or the division, and they are to be considered only as so many several securities to the crown; yet whether this warrant of the commissioners, which came before the assignment, is to be considered as equal to an extent, which I admit comes in time, if before the assignment. And I apprehend there is a great difference between them. An extent is a matter of record, an ancient common law process, and binds from the *teste* notwithstanding the statute of frauds, whereas this warrant of the commissioners is a mere matter in *pais*, the date whereof is of no consequence. And can it be imagined, that if the Parliament had intended to make the collector debtor to the crown, that they would not have left to the crown so noble a remedy as an extent; or at least have provided, that

[981]

that this warrant should be equal to an extent: whereas having not done so, but only impowered the commissioners to issue a warrant, and continued the charge on the division; it must be taken to be a provision in favour of the division, and for their reimbursement: that whereas without such provision, every man who is re-assessed, would have no other remedy, but a separate action for money had and received to his use, which would certainly lie against the collector who receives and does not pay over; they shall now all have a more expeditious and less expensive remedy. This is finding a proper use for the warrant of the commissioners. It falls in with the declarations in favour of the duty, that the division is not discharged, until the receiver general has the money; and it falls in too with the different constitution of the two officers, for one of which the division is answerable, and not for the other. And therefore I hope this action of trover is well brought.

Lord *Hardwick contra* delivered (at another day) the resolution of the court.

This case has been properly divided at the bar into two points. First, what the consequence would be, if this is considered as between two subjects; and secondly, whether the prerogative of the crown makes any difference. And as to the first of these, we are all of opinion, that if this was a case between two subjects, the property of these goods would be in the plaintiffs. The commissioners of bankruptcy have neither by the 13 *Eliz.* nor the statute of *Jac. 1.* any property vested in them, but only a power to take order about them by their discretion. *Sir T. Jones* 196. And when they have once executed that authority by assignment, the property is in the assignees by relation from the time of the act of bankruptcy committed; and an executor taken after such act of bankruptcy, and before the assignment at the suit of a subject, will certainly be avoided (1): as was held in in *Cole v. Davis*, *Hil. 10 W. 3.* and so is 3 *Lev.* 191, 69. for the execution is a *mesne* act, and as such will be avoided. *Salk.* 111. The property is not in abeyance until assignment, but remains in the bankrupt, according to *Salk.* 108.

L. Raym. 724.
post. 996.
2 Burr. 814.

But then secondly, we think here is such an intervention of the prerogative of the crown, as will defeat the plaintiffs in this

(1) *Vide Cooper v. Chitney*, 1 Burr. 20. 1 *Black. Rep.* 65. S. C. *Hitchin v. Campbell*, 2 *Black. Rep.* 827. That the assignees under these circumstances may either bring trover for the goods or assumpsit

for the produce of the sale. But they cannot bring trespass against the sheriff. *Smith et al assignees of Clarke v. Milles*, 3 *Term Rep.* 475. *Vide Cooke's Bank Law.* 679. 3 ed.

action.

action. For this purpose two things are to be considered; first, whether the money in the hands of the collector made him debtor to the crown for so much; and secondly, what effect the warrant and seizure will have in the present case.

And first we hold that notwithstanding the objections made at the bar, the collector is to be considered as the King's servant, and indebted to him. It is the King's money that is collected, and the allowance to the collector is not made by the division, but by the King: and though the division is liable for his imbezilments, yet that is only as so many several securities to the crown. To what purpose are powers given to the commissioners, to summon any person they suspect of imbeziling, if he is not considered as indebted to the crown?

[982]

And as to the second thing to be considered, viz. what effect the warrant of the commissioners will be of: we do not think it is equal to an extent, so as to bind the goods from the date: but what we ground our judgment upon is, that until an assignment the property was in the bankrupt; that the crown's hands were upon these goods, and created a lien before the assignment. The crown is not bound by the acts relating to bankrupts, not being named. *Sir W. Jones* 202. and though the King is bound by an actual assignment, *2 Show.* 481, yet that is because the property is then absolutely transferred to a third person (2). But relations, which are but fictions of law, cannot bind the crown. *Hob.* 339. And though the actual sale was not until after the assignment, yet the goods were *in custodia legis* before. *Cro. Car.* 148. Upon this seizure all the right which the assignees had, is to redeem the goods on payment of the money, which are in the hands of the commissioners as a pledge for that purpose. But they brought their action without payment or tender of the money, and consequently must fail in it.

The *posse* must be delivered to the defendants, and the plaintiffs must pay the costs of a nonsuit; which upon affidavit of the defendants acting as officers were ordered to be treble (3).

(2) *Lechmere v. Thoroughgood*,
3 Mod. 236. *Comb.* 123. *S. C.*
Rorke v. Dayrell, 4 *Term Rep.*
458.

(3) *Walker v. Sir Philip Egerton*, *Comb.* 322. *Hunt v. Robinson*,
Caf. Prac. C. P. 16. *Rex v.*
Poland, ante 49.

Dominus Rex *vers.* Smith.

On a *habeas corpus* the court will not determine the right of guardianship but set the child at liberty.
Cun. 75. S. C. more full.

A Boy between thirteen and fourteen years old was brought up by *habeas corpus* sued out by his father, in order to have him delivered over to him by an aunt, who kept him, according to *Johnson's* case (*ante* 579.) And now upon debate that case was over-ruled, and Mr. J. Lee said, Lord Raymond repented of what was done in that case. And all the court declared, that upon this writ they could only deliver him out of the custody of the aunt, and inform him he was at liberty to go where he pleased. And the boy chose to stay with the aunt; and they said that was all that was done in *Lady Catherine Annesley's* case: that the right of guardianship could not be determined by them in this summary way, and the father was not without other remedy: he might have trespass *quare filium et heredem suum rapuit*, or other actions, that would properly bring the right of guardianship in question (1).

(1) *Vide* Rex v. Sir F. Blake “judge upon the circumstances of *Delaval*, where the judgment given here is approved of, but the “the particular case, and to give “their directions accordingly.” And see Rex v. M. Mead, 1 Burr. down, “that the court are to 542.

[983]

Dominus Rex *vers.* Bartlett et al’.

Sessions cannot meddle with overseers accounts till allowed by two justices.
2 Barn. B. R. 400, 462.
1 Bott. by Const. 264. pl. 290. much fuller.

AN order made at sessions relating to accounts of overseers of the poor was moved to be quashed, because it did not appear the accounts had been before two justices *quorum unus*, and they cannot come *per saltum* to the sessions; and *Salk.* 533. was cited. On the other side it was said, that it appeared there was an allowance, for the appeal is said to be against the disbursements and the allowance thereof, which the court will presume was regular; and being in general, is not like the case in *Salk.* which was said to be by two justices without *quorum unus*. *Sed per curiam*, It does not follow that this was an allowance by two justices, for the parish might do it; and therefore for want of jurisdiction this order must be quashed (1).

(1) Rex v. Whitear & al’ 3 Burr. 1365 S. P. after 17 Geo. 2. c. 33. sect. 4.

Ruding *vers.* Newel. Ante 957.

THE plaintiff brought his *mandamus* to be restored to the office of register of the archdeacon; and *non fuit ap- punctuatus* being returned, brought his action, and falsified the return: the defendant brought error in the Exchequer Chamber. And it was held to be a *supersedeas* to a peremptory *mandamus*.

No peremptory *mandamus* pend- ing error on ac- tion for false re- turn.

Taylor *vers.* Lowe.

I Moved on the authority of *Noaks v. Watts*, (*ante* 420.) that the plaintiff, who was a *pauper*, might be restrained from going on to trial, till he paid costs for former notices. But the court thought that case did not put it on a right foot, and that it was absurd to make any rule about costs, whilst the admission stood; and therefore ordered plaintiff to shew cause, why he should not be dispaupered. And on affidavit of service made it abso- lute,

How *pauper* shall be punished for not going on to trial.

Salk. 306.

Dominus Rex *vers.* Inhabitantes de Sundrith in Kent.

UPON a special order of Sessions, it was stated, that *Thomas Perch* by indenture dated 25 March 1701. demised to *Thomas Gates* (the father of the poor person removed) a cot- tage with a garden, orchard and backside, in *Hever* for 99 years, at 5 s. *per annum*, which was the full value for any thing that appeared to the contrary. That the father lived there till his death, and then by will gave it to his son, who entered upon the premises, and becoming poor was removed. And the justices at sessions confirm the order of removal.

A man cannot be removed from his term. Burr. Sett. Ca. 7. and Sess. Ca. Ed. 1750. vol. 1. No. 200. S. C.

[984]

Strange moved to quash it, because a man cannot be removed from his own estate: and said, it had been gradually determined, and was now settled in the case of a term for years. It was first held in the case of a freehold, *Salk.* 524. then in the case of a copyhold of small value, *Pas.* 11 *Ann.* between *Harrow* and *Edgeware*, and afterwards *Trin.* 4 *Geo.* 1. *int' paroch' Mursley* and *Grandborough*, where the assignee of a term of 99 years at 1 s. *per annum* rent was held to be settled by being irremovable.

Ante 97.

Et per curiam, This man does not come in to settle after rambling about, as the statute 13 & 14 *Car.* 2, c. 12. has it; but comes to an ancient term, not newly created upon his arrival. In the

the case last cited the value of the whole was but 30 s. *per annum*, and the greatest part let off to others. But its being under 10 l. *per annum* shews, that the value is no more regarded in leaseholds than freeholds. As to the value in this case, it appears the justices never inquired into it, and from the particulars it must be above 5 s. (1) Therefore the order must be quashed.

(1) The father had charged it to be paid to the mother for her and all other his estates with 20 l. maintenance, *Vide Burr. S. C. 7.*

Dominus Rex vers. Jeffs.

In what cases
the King may
withdraw a juror

HE was indicted for barratry; and after some strong proof, the prosecutor could not go on for want of a copy of several processses. Whereupon it was insisted to withdraw a juror, as it was done last term on an indictment against the scavengers of *St. Giles's* for not paying money according to a justice's order; and there being some unpreparedness, Mr. *Abney*, one of the King's counsel, consented to withdraw a juror.

The Chief Justice at first inclined to it; but upon consideration held, that there was a difference between that case, which may be compared to cases of a civil nature, and this, where the punishment may be infamous, as the pillory; and for that reason it has never been done in perjury or forgery (1). And therefore he refused it in this case.

(1) *T. Raym. 84. contra. Vide* the power of the court to discharge a jury charged with a prisoner in a capital case fully discussed. *Fost. Cr. Law 23.* But that learned judge is of opinion that in capital cases to discharge a jury after evidence given and concluded on the part of the crown for want of sufficient evidence to convict in order to bring the prisoner to a second trial (as was done in *Whitbread* and *Fenwick's* case, 2 *St. Tr.*) is a most unjustifiable proceeding and ought never to be drawn into example. See 2 *Hawk. P. C. c. 47. s. 1. 459.* and the cases cited in the margin. 2 *H. H. P. C. 294.*

Holiday et al' *vers.* Colonel Pitt.

THE defendant was a member of Parliament for *Camelford*. And on 16 *April* last the Parliament was prorogued: on 17th a proclamation was ordered to dissolve it, which was published the 18th, and on 20 *April* the colonel was arrested at the suit of the plaintiff, and being in custody was charged with several other actions.

Members of Parliament have privilege of return after its dissolution. They may be discharged on motion without filing common bail (1).
Comyns 444.
Cal. Temp.
Hard. 28, 37.
Fort. 342.
2 Barn. B. R.
422, 433, 448.
Cunn. 16. S. C.

In *Easter* term last he moved to be discharged: for that members had a privilege *redeundo* after the dissolution, and the arrest was within such time of privilege.

After the matter had been spoken to in *B. R.* it was adjourned to *Serjeants-Inn*, to be argued before all the Judges. And the counsel for Mr. Pitt applied themselves to three points. 1. To shew that there was a privilege *redeundo* after a dissolution, as well as after prorogation, which was not disputed. 2. To shew that Mr. Pitt was arrested within that time of privilege. And 3. That this application for his discharge by way of motion was proper.

As to the first point: it was said, that all privilege arises by prescription time out of mind, and no new privilege can be created but by act of Parliament. Sir Robert Atkins in his treatise of the *Power of Parliament* 38, 39. That prorogations are modern, in comparison with the antiquity of Parliaments; and it was not till the time of Henry 8. that the present frequent prorogations were made. Formerly two or three new Parliaments were summoned in one year, and dissolved; and therefore the privilege *redeundo* (which it is agreed there is) must be after a dissolution as well as a prorogation. It is the duty of members to stay the whole session; and in 6 *H. 8. c.* 16. departing before the end of the session is a loss of wages; and in 4 *Inst.* 44. there are many instances of informations by the Attorney General for departing from Parliament. In *Scobel's Memorials* 88. it is mentioned to be a privilege, *eundo morando et redeundo* for themselves and servants, which is likewise mentioned page 103, 108. and in *Drew's Journal* 414. *Dodderidge's* preface to the opinions of learned antiquaries, and Sir R. Atkins 38, 39. So in the article of

(1) *Vide Chester v. Upsdale*, 1 *Wils.* 278. that it is discretionary in the court to proceed by motion or by writ of privilege according to the particular circumstances of the case.

[986]

wages, they were paid for some days after the dissolution; 4 *Inst.* 46. wages are due for every day, *veniendo, morando et exinde ad propria redeundo*, and the 35 *H. 8. c. 11.* gives them for as many days as may be reasonably taken up in coming and returning. In the *Register* 192. a. there is a writ to the sheriff to levy 19 l. 4 s. *pro expensis militum veniendo ad Parliamentum, ibidem morando, et exinde ad propria redeundo, pro 48 diebus.*

Another authority to shew that equal privilege subsists in returning as in coming, was from *Charta de Foresta, c. 11.* *Quicumque Archiepiscopus, episcopus, comes vel baro veniens ad nos ad mandatum nostrum, transierit per forestam nostram, liceat ei capere unam bestiam vel duas per visum forestarii si præsens fuerit; sin autem, faciat cornare, ne videatur hoc furtive facere. Hoc idem liceat eis redeundo facere sicut prædictum est.* And 4 *Inst.* 308. was cited to prove that the words *veniens ad nos ad mandatum nostrum*, were to be understood of coming to Parliament.

Another argument was drawn from 1 *Jac. 1. c. 3.* which was made to cure an inconvenience arising from this privilege as to members taken in execution out of the time of privilege, and to give the plaintiff a new writ of execution, when the time of privilege was over.

It may be objected, that these are not rights inherent in the commons, but what flow from the grace and favour of the crown, and on the beginning of a Parliament is asked by the speaker as such. To which it is answered, that this is done rather by way of recognition, and keeping up their right, than acknowledging it as a favour. And it appears in *Dewey's Journal* 122. and Sir *R. Atkins* 40. that Mr. *Onslow*, who was elected Speaker in 1566. neglected on his being presented to Queen *Elizabeth* to demand this freedom from arrests; and it was resolved that such demand was not necessary, and the privilege subsisted notwithstanding.

They likewise compared this to the case of witnesses, who are protected *eundo et redeundo*. 1 *Mod.* 66. 2 *Roll. Abr.* 272. The same as to the parties to the suit; and *Rastal*, tit. *Privilege*, uses the words in the writ for wages, *et exinde ad propria redeundo*. And this returning has never been very nicely scanned, so as to require a man to go the direct road. *Bro. Privilege* 4. allows that the protection is not forfeited by the plea of *extra viam*, because it may be he went to buy a horse, victuals, or other necessities for his journey. Neither is the law so strict in point of time, as to require the party to set out immediately after the trial is over; and for that was cited the case of *Hatch* against *Blisset*, vide *Trin.*

Trin. 13 Ann. in B. R. She had a trial at *Winchester* assizes, which was over on *Friday* at four in the afternoon: she staid there till after dinner on *Saturday*, and in the evening at seven was arrested going home to *Portsmouth*, which is twenty miles: and the court held, that she ought to be discharged, her protection not being expired, and a little deviation or loitering would not alter it.

Rep. Oib. 308.
4 Bac. Abr. 226.

[987]

The statute 12 & 13 W. 3. c. 3. was also mentioned, as taking notice of this privilege of freedom from arrests, and as making no distinction between a prorogation and a dissolution.

2. The next point was to shew that Colonel *Pitt* was arrested within this time of privilege; and for this were cited 2 Lev. 72. 1 Brownl. 91. which speak of it as subsisting for forty days after the Parliament. And in the *Irish* acts 3 Ed. 4. (which were generally transcripts of laws enacted here) it is expressly recited to have continuance for forty days before and after the Parliament finished. However this point was not much insisted on, it appearing that the House of Commons had always avoided determining this question, and had left it at large to a convenient time, of which themselves were the Judges: and therefore in the case of Mr. *Martin* in 1586. who was arrested twenty days before the meeting of the Parliament, the question was put, whether the House would limit the time, and resolved they would not; but they held that the twenty days were within a convenient time, and that therefore Mr. *Martin* should be discharged. *Scobell* 109, 110.

It doth not appear, they ever entered into the consideration of the nearness or distance of each gentleman's borough; but hold the same general rule, as it is done in *testes* and returns of writs at common law; which are the same near, as in the remotest counties.

This gentleman was arrested two days after the dissolution, before he had time to settle his private affairs and prepare for his journey. And the cases before cited of parties to a suit and witnesses were again relied on, to shew there was no occasion for him to set out immediately upon his return.

3. The third point (and indeed the only one the court doubted of) was whether he could be discharged by motion. And for this *Nelson's Collections*, Vol. 2. page 450. was cited, where it is said, that privilege of Parliament is a restraint to the proceedings of inferior courts. That the courts of *Westminster-hall* are bound to take notice of this privilege, and allow the time out of the sta-

[988]

tute of limitations. That it is *ex necessitate*, else he must lie till the next Parliament, which may be sooner or later. That for expedition many things are now done in a summary way by motion, for which formerly the party used to be put to his *audita querela*; and in the case cited of *Hatch v. Blisset*, she was discharged by motion. So on 7 *Ann. c. 12.* the servants of ambassadors are every day discharged on motion; and yet there are exceptions in that act, as to merchants and traders, which might be very proper for special pleading. And the statute 29 *Car. 2. c. 7.* against arrests upon *Sundays* was mentioned, where no doubt the party would be discharged on motion.

The counsel for the plaintiffs offered very little on the two first points; but applied themselves chiefly to the last, to shew that the discharge ought not to be on motion; and mentioned the case in *Salk. 544.* where it was held, that an attorney must plead his privilege: and *Carth. 131.* as to the act of oblivion. That the proper way would be to bring his writ of privilege, the suggestions whereof might be pleaded to, and this great point determined upon record. If there be no addition in an outlawry, it is bad; but must be avoided by writ of error. And wherever it has been intended to give a power of discharging on motion, it is mentioned particular, as to bankrupts, and seamen.

There was nothing said upon the argument by the Judges at *Serjeants'-Inn.* But the last day of the term the Chief Justice declared, that all the Judges were of opinion, Mr. *Pitt* was intitled to privilege *redeundo* for a convenient time, and that within that time he was arrested.

And as to the third point he declared, that there was great doubt amongst the Judges; who however did all agree, that if a writ of privilege was procured, that would remove all difficulties: and therefore the rule was enlarged till next term, without prejudice to the question, whether it could be done by way of motion or not.

Early in the next term a petition was presented to the Lord Chancellor, with an affidavit to verify it. And upon presenting it, his Lordship said, that in so untrodden a path as this, he should be very careful what he did; and as it was not his business to draw the writ, he expected Mr. *Pitt's* counsel should prepare one, and send him and the Master of the Rolls a copy of it: which was done, from *Pryn's* 4th vol. of *Parliamentary Writs*, 722, 755, 759, 776, 784, and a day appointed to speak to it before them both. There were no counsel attended on behalf of the plaintiffs, the main point being determined against them.

But

But several objections being taken to the manner of verifying the petition, and to the draft of the writ, the matter was put off, with an intimation that it was hardly probable any determination would be made within the term; and therefore recommending it to Mr. Pitt's counsel, whether they would not try what they could do in *B. R.* upon their motion, before the term was over. Upon this the petition was withdrawn, and mention made to the Judges of the King's Bench, that their opinion was desired upon the motion.

[989]

Whereupon the evening before the end of the term, the Judges all met again at *Serjeants'-Inn*. And the last day of the term the Chief Justice delivered their opinions.

That all the Judges, except the Chief Baron *Reynolds*, and Baron *Thompson*, were of opinion, that Mr. Pitt ought to be discharged on motion: that the Chief Baron did not say it would be wrong to do so, but was doubtful; and as for Mr. Baron *Thompson* he was strongly against it.

As what is to be done is therefore clearly the opinion of ten Judges, I will briefly state the ground they go upon. For that purpose they have taken two things into consideration. 1. How the law stood before the 12 & 13 W. 3. c. 3. and, 2. Whether that has altered the law, and how far.

As to the first we think that before the statute 12 & 13 W. 3. the method in *Westminster-hall* was, to discharge by writ of privilege, which was in nature of a *superfedeas* to the proceedings, and the pleading concluded, *si curia Domini Regis placitum predest cognoscere velit aut debeat*; 1 *Pryn's Register* 660.

And as to the statute 12 & 13 W. 3. we think it has made two alterations. 1. That it has taken away the old plea of privilege; and, 2. By making the arrest irregular and illegal.

The act was designed to abridge the privilege, and to give leave to proceed after a prorogation. Then comes an enacting clause with negative words, that the body of a member shall not be arrested during the time of privilege. The old plea therefore of not proceeding is taken away, for it is made lawful to proceed, and he cannot plead to the process though irregularly arrested; agreeable to what was held in the case of *Widrington v. Charlton*, *Hil. 11 Ann.* in an appeal. If he cannot take advantage of this the old way, there is no other left but by motion; and it being rendered illegal to arrest the body, it is an irregular execution of the process. In *Sir Richard Temple's case* in 1 *Sid. Raym.* 12.

192. and 1 *Keb.* 727. the Judges told Sir *Richard* he must shew his return, or writ of privilege. Here the defendant has complied with the first part, by producing the original return. In Lord *Banbury's* case in *Salk.* 512. it is said, they would not proceed to try his peerage by motion; but I have seen a manuscript report of that case, where *Holt* says, if there had been no dispute of the identity of the person, and the summons to Parliament had been shewn, he would have discharged him on motion. There was my Lord *Mordington's* case in *C. B.* in my Lord *King's* time: and he being a *Scotch* Peer was arrested, and the act of Union having given them the privilege of *English* Peers, he was discharged upon motion (2).

In the present case here is matter of record produced to warrant the discharge, and if we have proper evidence, why should not the remedy be speedily applied?

It is certainly so, as mentioned at the bar, that ambassadors' servants, and persons arrested on a *Sunday*, are discharged on motion. There are many writs in *Rasfal* for discharging jurors, and witnesses, and yet it is done every day by motion; and those writs only prove, that it may be done another way. And the inclination of courts to discharge on motion has been so great, that the party arrested may apply to the court under whose protection he is, or the court out of which the process issues, which ever happens to sit first.

And if in *Blisset's* case the court above took notice of the privilege of the court of *nisi prius*, and discharged her; what reason is there we should not pay the same regard to a superior privilege?

There must be a rule to discharge the defendant out of the custody of the marshal.

See *Dutton v. Pitt*,
Barnes 199. n.
p. 2 ed.

N. B. The rule was at first pronounced to be upon filing common bail: but before the court rose, the Chief Justice ordered that part to be struck out, because it in some measure warranted the arrest.

(2) *Rep. Fort.* 165. *Vide 2 Cromp. Prac.* 138.

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Michaelmas Term

8 Georgii 2 Regis. In B. R.

Philip Lord Hardwicke, *Lord Chief Justice.*

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.* } *Justices.*

William Lee, *Esq;*

John Willes, *Esq;* *Attorney General.*

Dudley Ryder, *Esq;* *Solicitor General.*

Cafe of the Borough of Warwick.

APPEAL from a poor's rate: and the sessions ordered the churchwardens to produce the books at an adjourned day, before which a *certiorari* was brought to remove that order; and held to lie, though the appeal is depending; else the order must be obeyed before the validity of it can be determined.

Certiorari.
Cann. 99. S. C.

It was also held, that an appointment of overseers may be removed before an appeal to the sessions; for the rule laid down in *Salk.* 147. extends only to the case where there is a limited time for appealing, as to the next quarter-sessions; but the statute 43 *Eliz. c. 2.* is not so restrained: and consequently it can never be said, that the time for appealing is out. And if the appeal from an appointment is lodged, there can be no *certiorari*, till the sessions has made a determination, and a *certiorari* brought pending such appeal shall be superseded (1).

(1) *Vide Rex v. Harman, Andr. S. C. Rex v. Holditch, 1 Bott by 343. 2 Sess. Ca. 201. pl. 147. Const. 53. pl. 60.*

Rattle *vers.* Popham.

A power to grant a life estate is not well executed by a lease for 99 years determinable on a life.

Cunn. 102. S. C.

vide ante fact
of this case more
fully stated in
England on Bonds
app. 4 No. 13. p. 869.
Vol. 2 Vol. 844 &
Vol. 835.

IN ejectment, it appeared, that upon a marriage settlement, a power was given to every tenant for life when in possession to limit the premises to any woman he should marry for her life by way of jointure and in bar of dower. The tenant for life made a lease for 99 years determinable on the death of his wife; and it was held, that however she might be intitled to relief in a court of equity, yet at law it could never be said to be an execution of the power: for the estates are very different, one being a freehold and the other a chattel, and the freehold in her being a qualification to any after-taken husband to be a member of Parliament, kill game, &c. And 8 Co. 69. Ley. 74. Co. Litt. 45. were cited, where the powers in bishops or tenants in tail to make leases have been held to be strictly pursued (1).

(1) The widow having brought her bill in chancery, Lord Talbot held the lease to be warranted by the power, and that it was not a defective, but a blundering execution, and he decreed the defendant to pay all the costs both

at law and equity. *Per* Lord Mansfield, 2 Burr. 1147. *Zouch v. Woolston*, in which case the court were of opinion, that whatever is an equitable, ought to be deemed a legal execution of a power.

Dominus Rex *vers.* The Justices of Somersetshire.

Vestry cannot order overseers to retain balance of their accounts. 2 Sess. Ca. p. 283. No. 174. Cunn. 105. S. C.

MANDAMUS to the justices, to grant a warrant for levying 30*l.* 17*s.* 11*d.* being the balance of the last overseers of the poor's account in their hands. They return, that true it is there was such a balance, but that the vestry had ordered them to retain it, and employ an attorney to sue for some charity money, and get it laid out for the benefit of the poor; that one Young was so employed, and the balance exhausted in fees, and that the overseers had engaged to pay Young; *et ea de causa* they had refused to grant the warrant.

Et per curiam, There must go a peremptory *mandamus*, for the statute 43 *Eliz. c. 2.* says, the balance shall be paid over to the new overseers, under a penalty: and it is not in the power of the vestry to dispense with the statute.

Smith *vers.* Dr. Bouchier et al^s.

TRESPASS and false imprisonment against five defendants. They all join in a plea of Not guilty as to all but eight days imprisonment, which they justify, for that the chancellor and scholars of *Oxford* were a corporation by prescription, and that by act of Parliament, 13 *Eliz.* they were incorporated, and had power by custom to hold a court every *Friday* before the chancellor, his commissary or deputy, for all personal actions, where either party was a scholar, or had the privilege of the university. That by the custom, a plaintiff making oath, that he has a *personal action* against any person within the precincts of the university, and that he believes the defendant will not appear, but run away, the Judge may award a warrant to arrest him, and detain him till security given for his answering the complaint. That 7 *August* 1731, the defendant *Bouchier* having the privilege of the university, made a complaint to the defendant *Shippen* the vice-chancellor, of a personal action against the now plaintiff, to his damage of 1000*l.* according to his estimation, and that he suspected the now plaintiff would run away: that he took his oath of and upon the truth of the premises, upon which a warrant was granted to the other defendants, who arrested him, and kept him in prison eight days for want of sureties; and traverse their being guilty *aliter vel alio modo*. To this there was a frivolous replication, and to that a demurrer.

Justification under process of university of *Oxon* held ill, and where those who might justify join those who have not a good justification, it is bad as to all.
Caf. temp.
Hardw. 62.
a Barn. B. R.
 331.
a Kely. 144.
pl. 123.
Cuan. 89, 127.
S. C.

Strange pro quer' argued, 1. That the custom was bad; and 2. If good, yet it is not pursued.

His objections to the custom were all over-ruled, but were, 1. That the custom is to make oath that he has a personal action, not a cause of action; so he must swear to matter of law. *Sed per curiam*, That is no more than is done in many cases. 2. In the case of a *ne exeat* there must be oath of the parties, declaring he intends to go abroad; whereas here a bare belief is sufficient, without shewing the grounds of it.

But upon the second head the court held that the custom was not pursued. 1. By the custom he is to swear to his belief of the defendant's design to run away; whereas the oath is only that he suspects it, which is not the same: that may be a ground for suspicion, which will not induce a belief. 2. The oath is only of and upon the truth of the premises; now a man who swears the premises are false, does so. *Hil.* 12 *Ann. Regina v.* 10 *Mod.* 281, *Green*, a conviction for selling bread quashed, because the witness

was

nels only swore *de veritate præmissorum* (1). So *Paf. 13 Ann. Regina v. Gery*, *præstat sacramentum de veritate materiarum in informatione contentarum*, was held ill.

For these reasons the justification was held ill. And though some of the defendants, as the officer and gaoler, might have been excused, if they had justified without the plaintiff, or the vice-chancellor (2); yet it was held, that by joining with them, as to whom the process was no justification, they have forfeited their justification (3); now the Judge and the plaintiff knew the oath was not sufficient. And 2 *Lutw.* 935. goes upon that, and so did the case of *Philips v. Biron* (*ante* 509.) (4). Upon this foundation therefore the plaintiff must have judgment against all the defendants.

(1) *Rex v. Pullen*, *Salk.* 369. *contra.*

(2) All the reports of this case concur in making the court incline to this judgment upon the first argument, but in *Cunn.* 127. Lord *Hardwicke*, in delivering the final judgment of the court, rather expressed a contrary opinion, and in *Perkins v. Proctor*, 2 *Wils.* 385. the court made a

quære as to this *dictum*, for none could have justified the whole proceedings, they being *coram non iudice*, and a mere nullity. *Vide Hill v. Bateman*, *ante* 711. *Shergold v. Holloway*, *post.* 1002.

(3) *Middleton v. Price*, *post.* 1184. S. P.

(4) *Vide also Parsons v. Lloyd*, 2 *Black.* 845. and in *Perkins v. Proctor*, 2 *Wils.* 382.

Tryon *vers.* Carter.

immaterial issue.
Cunn. 71. 106.
S. C. more full
cited 1 *Burr.*
302.

A Bond was conditioned for the payment of money on or before 5 *December*. The defendant pleaded payment on the 5 *December*, to which there was a replication (1): and a verdict for the plaintiff. But a replender awarded, as being an immaterial issue, for it finds no breach of the condition, because it might be paid before the 5 *December*, and then the condition is performed: and it is not like a case where a condition is to pay upon such a day, for then there can be no legal pay-

(1) The replication as stated in *Cunn.* 71. and *Bull. L. N. P.* 162, was, "that the money was not paid on that day," which was ill, for the defendant having pleaded a strict performance, and not a collateral matter, the replication ought not only to have

met the defendant's plea, but have shewn that the money was not paid at all. *Vide Fletcher v. Hennington*, B. R. 2 *Burr.* 944. 1 *Black.* 210. S. C. *Anon. C. B.* 2 *Wils.* 173. *Bull. L. N. P.* 162.

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ment till that day, an actual payment before being but in the nature of a deposit, till the day. But here it would be a legal payment at any day. *Vide ante* 493. *Colborne v. Stockdale*. 1 Saund. 102. *Jernegan v. Harrison*, *ante* 317.

Dominus Rex *vers.* Ellis.

BY the charter of *New Romney* the new mayor is to be sworn before his predecessor. At the election there were two candidates, *Ellis* and *Whitwick*; *Ellis* had the majority, notwithstanding which the mayor ordered *Whitwick* to be sworn; upon which the town clerk read the oath, and both *Ellis* and *Whitwick* had their hands upon the book, and kissed it. Upon trial of the issue, whether *Ellis* was duly sworn, it was ruled by *Eyre C. J. de C. B.* at *Maidstone*, that it was not a good swearing; for as it is to be the act of the mayor, his assent must go along with it: and that there is no difference between swearing *by* and *before* the mayor. And now upon motion for a new trial the court were of the same opinion, and there was judgment against the defendant.

Where the mayor is to be sworn before the last mayor there must be his assent to the swearing, and his presence is not sufficient.

Howard *vers.* Poole.*

[995]

THERE was a joint commission against the defendant and his partner. And the plaintiff was a separate creditor of the defendant's, and arrested and held him to bail. But on motion he was discharged on common bail; the plaintiff being such a creditor, as might have come in under the joint commission (1).

Separate creditor may come in under a joint commission of bankruptcy. *Cunn.* 111. *Lex. Merc. Red.* 498. *S. C.*

*Note, the defendant had no separate estate, and all the joint effects were swallowed up by the joint creditors, so that the defendant's separate creditors had nothing. *MSS.*

(1) *Wilkes v. Strahan*, *post.* 1157. *S. P.* The joint estate is to be applied first to pay the joint debts, and the separate estate the separate creditors, and if there be a surplus of one, it is to go to

supply the deficiency of the other.

Ex parte Sandon, 1 *Atk.* 68. *Ex parte Crowder*, 2 *Vern.* 706. *Ex parte Bond*, 1 *Atk.* 98. *Ex parte Rowlandson*, 3 *P. Wms.* 405. *Ex parte Cook*, 2 *P. Wms.* 501. *Goss v. Du Fresnoy*, *Davies* 373. As to the proof of joint debts under a separate commission, *vide Cooke's Bank. Laws*, 3 ed. 298 to 319.

Dominus Rex *vers.* Bell.

No new trial to
be granted after
four years ac-
quiescence.
Cunn. 113.

AN information in nature of a *quo warranto* was brought against the defendant, to shew by what authority he claimed to be a common-council-man of *Marlborough*; and upon a trial in 1731, there was a verdict for the defendant.

This term the prosecutor moved for a new trial, as being a verdict against evidence; and the prosecutor referred to the report of the Judge, and insisted he was not too late, there being no judgment yet signed, according to the case of *Gilman v. Smith*, *Mich. 9 Geo. 1.* where it was held, that though the four day rule be out, yet it is sufficient if they come before judgment. *Ante* 845.

Ante 392, 384.

But the court would not suffer the merits of the motion to be gone into, on account of the length of time since the verdict; it being possible that many men's rights might depend on the validity of this man's vote, which the corporation was bound to admit after a verdict establishing his right. And it would be much less mischief, to let this verdict stand (supposing it to be wrong) than introduce a general inconvenience. They said all new trials were discretionary: and though my Lord *Holt* entertained a notion of their being ancients than the case in *Stiles*, from the challenge we meet with in the old books, that the juror had before given a verdict in the same cause; yet it does not thence follow, that the court granted a new trial upon the evidence; for it might appear to be a mis-trial upon the record, or there might be other reasons to award a *venire facias de novo*.

[996]

Rush et al' assign' Ryland *vers.* Baker.

Trover lies
against taker in
execution of
bankrupt's
goods, without
joining the
officer.
Bull. L. N. P.
47.
Cunn. 130. S. C.
more full.

THE defendant was plaintiff in an action against *Ryland*, and took his goods in execution after an act of bankruptcy committed, but went on and received his money. And now trover being brought by the assignees, and a verdict in their favour; it was held on a motion for a new trial, that the action was well brought against the defendant, who received the money, without joining the officer.

Williams *vers.* Browne.

THE question in this case was, whether cross remainders were created by implication from the words of a will. And the arguments of the counsel, and the resolution of the court, being the same as in the case of *Cumber v. Hill*, *ante* 969, which was held not to differ materially from this; it will be only necessary to set down the words of this will, which for the reasons given in that case were held not to create any cross remainder.

Of cross remainders.
2 Barn. B. R.
238. 416, cited
Andr. 134. B. C.
MSS. S. C.

The devise was to *Mehetabel* for life, remainder to the use of all and every the child and children both male and female born and to be born of the body of the said *Mehetabel*, equally to be divided between them, and of the heirs of their *respective* bodies lawfully to be begotten, and for want of *such* heirs, the remainder over to another daughter and her issue, in the same words (1).

(1) *Vide Cumber v. Hill*, *ante* implication, in a will between 969. where the principal cases more than two, are cited in the of raising cross remainders by notes.

Dominus Rex *vers.* Lloyd.

A Complaint in writing was exhibited to the quarter-sessions of *Cardigan* against *Thomas Lloyd* clerk of the peace of that county, containing several charges of misbehaviour, which if true, were a sufficient cause to remove him from that office. The sessions received the complaint, and order'd *Lloyd* a copy, and time to make his defence. And on the day appointed, reciting the complaint and notice, "Upon due examination thereof
"openly this day in court, and of the several matters and
"charges therein contained and herein before partly specified,
"alleged and charged against the said *Thomas Lloyd*, and upon
"full hearing and examination of several witnesses and other
"due proofs touching the several charges against the said *Thomas Lloyd*, in the said articles contained, openly this day in court
"in the presence and hearing of the said *Thomas Lloyd*,
"and of his counsel, who now attend in this court on
"his behalf, and make a defence for him, and upon hearing
"what is alleged and insisted upon by the said *Thomas Lloyd*
"and

On removal of clerk of the peace the evidence need not be set out in the order.
1 Sess. Ca. p. 233. No. 190.
2 Barn. B. R. 302. 338. 466.
Cunn. 84. 133.
S. C.

“ and his counsel in his defence ; this court adjudges him guilty
 “ of several of the articles, and remove him from his office pur-
 “ suant to the statute.”

A *certiorari* was brought to remove this into *B. R.* and *Denison pro defendente* objected, that this being a conviction in a summary way before justices of peace, and without a jury, and the statute 1 *W. & M. c. 21.* requiring the removal to be upon due proof of the misdemeanor complained of ; the evidence in this case ought to be set out, that the King's Bench may see, whether there was due proof ; and not trust the justices, who may have deprived the defendant of his freehold upon less evidence than they ought to have done, or perhaps upon that which is no evidence in point of law. The common law ranks trials by proof, or *per testes*, amongst the several sorts of trial, and there the evidence, or the substance of it, is set out in the record. *Rast.* 228. 9 *Co.* 3. 2 *Roll. Abr.* 577. *Co. Litt.* 6. *Co. Ent.* 463. *Cro. Eliz.* 736. 1 *And.* 20. And so it is on demurrers to evidence. In convictions about the game, the evidence is always set out.

Strange contra, The statute on which this is founded, gives power to the quarter sessions, on a complaint and charge in writing to be exhibited against any clerk of the peace of any misdemeanor by him committed, to examine into the same *openly* in their general quarter sessions, and *upon such examination and due proof*, to suspend or discharge him from his office. By this act three things are required. 1. A misdemeanor ; 2. A complaint thereof in writing ; and, 3. Examination and due proof openly. All which the proceedings shew to have concurred in the present case. For as to the first, It is not disputed, but here are such facts alleged, as if true, are a great misdemeanor. As to the second, here is a complaint of them in writing. And as to the third, the words of the act are complied with, and the intent too ; for the record says, it was upon examination openly and due proof.

But to this it is objected, that this is in nature of a conviction in a summary way ; and that therefore the evidence ought to be set out, that this court may see there was due proof, and the cases of convictions have been cited for that purpose. And I do admit, that in the cases of convictions before one or two private justices, the authorities are, that the evidence should be set out, that it may appear, the informer was not admitted a witness. But this case differs widely from them. 1. As this is an order, and not a conviction ; 2. As it is a proceeding at sessions, and not before private justices.

As to the first, there is a standing distinction between orders and convictions. These orders, like all others, are drawn up in *English*, but convictions in *Latin*. Is this more like a conviction than an order of bastardy, where the evidence never is set out, but a general adjudication of being the putative father? In cases of orders of settlement, and for wages, the court gives that credit to the general adjudication, that they presume it to be right, unless the contrary appears. *Salk.* 442. And this indulgence has been extended to convictions. *Trin. 9 Geo. 1. Rex v. Ford*, In a conviction for keeping an alehouse on 3 *Car. 1. c. 4.* it was excepted, that the justice could not proceed if the party had been punished by 5 & 6 *Ed. 6. c. 25.* there being a clause of exemption in 3 *Car.* but the court held, that need not be set out, and they would not presume a want of jurisdiction. So in the case *Rex v. Theed, Mich. 11 Geo. 1.* conviction for obstructing an excise officer: and objected, that they should shew it was in the day, else he may be obstructed, if he comes without a constable. *Et per curiam*, It is enough the conviction does not appear to be wrong. And even in the case of convictions on the game laws, though the court will not allow the witness to swear generally that the party is not qualified (1); yet the general allegation is sufficient, where it is the words of the justice.

Ante 555.
3 Mod. 174.

L. Raym. 1375.
Ante 603.

But secondly, this is an order of sessions, where the evidence never is recorded: and it would be extraordinary to expect it should be taken down, it concerning the defendant, who was the officer till the evidence was over. The act requires the proof to be openly in court, which must be understood *viva voce*; and the same clause requiring the complaint to be *in writing*, as opposed to the word *openly*, shews it it was never expected the evidence should be taken down. This court always pays regard to the method of proceeding in inferior courts; and I put it on the other side to shew one order of sessions, where the evidence has been set out. There have been but three of these orders before, *Regina v. Baines, Rex v. Horwell*, and *Rex v. Harland*: and they are in the same manner, upon examination and due proof; and therefore this, if it be an error, is justified by precedent.

L. Raym. 1199.
Salk. 680.

And as to the objection, that it is to deprive him of his freehold, and therefore the court should see it is done upon legal evidence: the same may be said, even where there is a verdict, for there the court direct what shall be admitted as evidence, and are as liable to mistake.

(1) *Vide Rex v. Marriot, ante 66.*

The court took time to consider of this case, and this term the Chief Justice delivered the resolution of the court.

Chief Justice, It is fully settled, that in convictions the evidence must be set out; and if this was to be considered as a conviction, it therefore would be bad (2). But we are all of opinion, it is to be considered as an order. In the three cases which have been upon the act, the *certiorari's* were to remove them as orders, and they are in *English*, which could not be, if they were convictions. *Baines's* case was before all the Judges, and they treated it as an order. And though it is said, here is a punishment that follows, *viz.* the loss of the office; yet the same may be said of most of the acts of justices, where very severe penalties often follow. The cases of orders of bastardy are very strong, which are grounded on much the same words in 18 *Eliz. c. 3.* as are in 1 *W. & M. c. 21.* And as to the cases of setting out evidence on demurrers; it is absolutely necessary to have it on record, and the superior court are Judges of the fact, as well as the law; which on a *certiorari* we are not.

This exception was taken in the case of *Horwell* by Mr. *Lechmere*; but the defendant died before any thing done upon it. And as to *Baines's* case, it is a strong negative authority, for that was greatly canvassed at the bar and bench, and yet this exception not taken. At first we thought this a strong objection: but are convinced, there is this distinction between orders and convictions, and the precedents are not to be shaken. This therefore, being an order, must be confirmed.

(2) *Vide Rex v. Theed, ante 919.*

Dominus Rex vers. Robe.

Judgment arrested for the generality of the charge in an information (1).
2 Barn. B. R.
185. 191. 623.

AN information was filed against him for several illegal actions in his office of clerk of the market, and there were several counts specifying sums taken of particular persons; upon all which distinct charges the defendant was acquitted; but at the close of the information there was a general charge, of which he was found guilty, *viz.* that under colour of his said office he did illegally cause his agents to demand and receive of

(1) *Vide Davy v. Baber* in an 2471. 2 *Hawk. P. C. cb. 25.*
action on statute of bribery, 2 *sect. 57. p. 321.*
Geo. 2. c. 24. S. P. 4 Burr.

several

several other persons several other sums of money, on pretence of weighing and examining their several weights and measures. Exception was taken, that this is so general a charge, that it is impossible any man can prepare to defend himself on this prosecution, or have the benefit of pleading it in bar to any other: and for this fault the judgment was arrested. *Ante* 2.

Lord Clinton *vers.* Morton.

[1000]

THE defendant insisting upon his discharge many years ago under a commission of bankruptcy, and it being doubtful whether the clause that enabled bankrupts to plead generally was still in force (1); he moved, and had leave to plead it both ways, generally and specially: which I take to be a new case upon the act, the words whereof are only, that he shall with leave of the court plead several matters. *Strange pro deficiente*, and advised the motion. Pleading double.

(1) That it is, *vide* Price v. Alsop, Doug. 160. Cooke's Bank. Lowr 585. 3 ed.

Philips *vers.* Wood et al'.

LEAVE was given to plead *non assumpsit*, and a discharge by bankruptcy, though said to be denied in C. B. (1) Plead double.

(1) Newman v. Chander, Fort. 336. *contra*.

Lumley *vers.* Palmer.

THE defendant was sued as acceptor of a bill of exchange. And upon the evidence it appeared to be a parol acceptance only, which the Chief Justice ruled to be sufficient, that being good at common law, and the statute 3 & 4 Ann. c. 9. which requires it to be in writing in order to charge the drawer with damages and costs, having a proviso that it shall not extend to discharge any remedy that any person may have against the acceptor. Upon this direction the jury found for the plaintiff. But the Chief Justice of the Common Pleas having lately ruled it otherwise in the case of *Rea v. Meggott*, the court was moved for a new trial. And in order finally to settle this point, it was ordered to be argued: and after argument the court was of opinion, that the direction in the present cause was right, and

A parol acceptance is sufficient in action against the acceptor. Cas. temp. Hardw. 74. More full Bacon's Abr. 622. S. C.

Vol. II, B b agree-

agreeable to constant practice, and therefore ordered the *poslea* to the plaintiff (1).

N. B. Trin. 10 Geo. 2. Lord Hardwicke said at Guildhall, that on conference with the Chief Justice of the Common Pleas, he waived his opinion, and said, he thought the King's Bench had done right in this case.

(1) *Acc. Eschine v. Murray*, *Mierop*, per Lord Mansfield, 3 ante 817. *Julian v. Shobrooke*, *Burr.* 1672. *Conced. in Sprout* 2 *Wilf.* 9. In *Pillans v. Van v. Matthews*, 1 *Term Rep.* 182.

Dominus Rex vers. Johnson et al'.

Challenging the array, where a contempt.
Bull: L. N. P. 305. S. C. but made a quære.

[*1001]

See explanation
of this case
from *Crit. Comp.*
105. (2nd edition)
of *Case v. Edwards*
4 *Bound Ald.*
471. 483.

THE defendants in an information *in natura de quo warranto* obtained the common rule for a special jury, which was drawn up as usual, for the sheriff to attend with the freeholders' * book, and that he should return the twenty-four struck by the master. The prosecutor took out the *venire* to the sheriff of *Cheeshire*. And the defendant challenged the array, on account of an interest the sheriff had, as being a freeman of *Chester*, whose rights were to be tried. And upon arguing this challenge before the *Chester* Judges, viz. Mr. *Verney* and Mr. *Jessop*, they were of opinion to allow the challenge; though it was much insisted on, that since the late act the sheriff had no influence, he being only to return the list brought him as struck; but the right of challenging not being taken away, nor his power of marshalling the panel and putting which he pleased first, it was determined to be a good challenge, and the array was quashed.

It was then moved, that an attachment might issue against the defendants as for a contempt in challenging contrary to the rule of court; and the case of *Burridge* (ante 593.) was cited, where on a rule by consent for a special jury, he challenged the array for want of hundredors, and the court granted an attachment against him. But the court did not seem to relish that case; and said it might be an authority in one exactly circumstanced as that was, but in no other. That in the present case, though the sheriff is mentioned in the rule, yet that is only as he is the usual officer; but it did not preclude the prosecutor from taking the *venire* to the coroner. And the court remembered in what manner the motion was made by *Strange*, viz. that wherever the prosecutor thinks fit to take his *venire*, there may be a special jury.

Between the Parishes of St. George Hanover Square and St. James Westminster.

UPON an order of sessions the case was stated specially, that *Alice Wheeler* a parish girl was bound by indenture an apprentice to *George Wheeler* in *St. George's* parish, where she served forty days; and her master afterwards let her out for hire to a person in *Marybone*, where she resided above forty days, but the master received her wages and found her cloaths.

The sessions held, that the last service gained her no settlement, and consequently she was settled at *St. George's*. But the court quashed the order, being of opinion, that there was no difference between the master's hiring her out, and her own act; and that it was like the case of a binding to *A.* and serving *B.* where it has been always held to be a settlement in *B.'s* parish. So the order of sessions was quashed (1).

(1) *Rex v. Inhabitants of East Bridgeford*, Burr. S. C. 133. *Rex v. St. Petrox*, ib. 248. *Rex v. Clapham*, ib. 266. *Rex v. St. Mary Kalendar in Winchester*, ib. 274. *Rex v. Tavistock*, ib. 578. Vide also *id. lib. No. 133. 142. 164. 174. 180. 193. 239. 250.* Some of these cases turn upon the assignment of the apprentice; others upon his serving another master by consent without an assignment, and others upon his discharge. But in all of them it is considered what shall, under the particular circumstances of each case, amount to such a service under an indenture as will be sufficient to gain a settlement. Burr. S. C. 16. note.

Shergold *vers.* Holloway.

[1002]

A Justice of peace granted his warrant directed to the defendant in these words, "Whereas complaint is made to me on the oath of *John White*, that *William Shergold* refuses to pay him wages; these are to require you, to cause the said *Shergold* to appear before me or some other justice, to answer the complaint aforesaid; and give notice to the said *White*, before what justice you appear."

Of the jurisdiction of justices as to wages. 2 Sess. Ca. p. 100. No. 100. more full S. C.

Upon this the defendant took up the plaintiff, and carried him before the justice, who bound him over to the sessions; upon which the plaintiff brought his action, and a case being made at the assizes, the same was argued above, and these points resolved.

1. That though the statute 5 *El. c. 4.* does not expressly empower the justices to order the payment of wages; yet they have been so long indulged with it by the courts, under the general power of setting the rate, that it is not now to be disputed (1).

2. That the justice has no power to grant a warrant to apprehend the party, he can only issue a summons. And that a warrant expressly to arrest the party will not justify the officer, there being no pretence for such a jurisdiction (2).

3. That this, though oddly worded, was not a warrant to arrest the plaintiff. For the defendant might cause him to appear by distress, and it was not equivalent to the words *bring before me*. So the plaintiff had judgment.

(1) *Vide Rex v. Helling, ante 8. 711. Smith v. Boucher, Conn. 127.*

(2) *Vide Hill v. Bateman, ante Ante 994.*

The Bank of England *vers.* Morrice.

Amendment.
3 Barn. B. R.
183. 374.
3 Kely. 165.
S. C. cited Andr.
110.

TO a plea of several specialties in an action on simple contract, the plaintiffs replied *assets ultra*; which was found for them, but the verdict set aside. They then moved for leave to alter their replication, and reply fraud; and cited 3 *Lev.* 368. But the court said, there must have been some consent in that case, else it is an authority for withdrawing all vitious pleading at any time. And here it might be dangerous, because the defendant on the former issue might have paid away assets, as knowing that replication could not hurt her. So it was denied to amend (1).

(1) *Vide Alder v. Chip, 2 Burr. 755. Hutchinson v. Brice, 5 Burr. 2692.*

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Hilary Term

8 Georgii 2 Regis. In B. R.

Philip Lord Hardwicke, Chief Justice.

Sir Francis Page, Knt.

Sir Edmund Probyn, Knt. } Justices.

William Lee, Esq;

John Willes, Esq; Attorney General,

Dudley Ryder, Esq; Solicitor General.

Case of the Borough of Bossiny, alias Tintagel in Cornwall.

THE court was moved for a *mandamus* on the statute 11 Geo. 1. c. 4. to go to the election of a mayor. Which was opposed, on a pretence that on the usual day one Robins was chosen and sworn into the office; and therefore as there was an actual officer, they ought first to oust him. But the court (upon consideration) held the writ ought to go, the act saying, If no due election was made, and this of Robins having no shadow of right: the intent of the act was to give the corporation a rightful officer as soon as might be, whereas this pretence would waste the whole year; they said, this was not laid down as a general rule, for it might be otherwise where there was a probable election and room to doubt (1); and that these

Mandamus may be granted to go to an election, though there is a mayor *de facto*, if he have no colour of right.
3 Bac. Abr. *Mandamus* (E.) 540. S. C.
15 Vin. Abr. 216. (Z.) pl. 1.

(1) Vide case of *Aberystwith*, v. *Newsham*, *Pasc.* 1755. 28 Geo. 2. cited *ib.* 2009. But the mayor *de facto* must be made party to the rule to shew cause. *Rex v. Cambridge*, 4 Burr. 2008. *Rex Banks* *ut supra*.

writs were discretionary: besides there was no harm done, for it is not a peremptory *mandamus*, and they may return that there is a rightful officer (2).

(2) *Vide Rex v. The Mayor, &c. of York*, 4 Term Rep. 799. 699

[1004]

Sir John Lade *vers.* Shepherd.

By setting out a highway the owner does not part with the property of the soil.

1 Burr. 136.

UPON trial of an action of trespass a case was made, that the place where the supposed trespass was committed was formerly the property of the plaintiff, who some years since built a street upon it, which has ever since been used as a highway. That the defendant had land contiguous parted only by a ditch, and that he laid a bridge over the ditch, the end whereof rested on the highway. And it was insisted for the defendant, that by the plaintiff's making it a street, it was a dedication of it to the publick; and therefore however he might be liable to an indictment for a nuisance, yet the plaintiff could not sue him as for a trespass on his private property. *Sed per curiam*, It is certainly a dedication to the publick, so far as the publick has occasion for it, which is only for a right of passage. But it never was understood to be a transfer of the absolute property in the soil (1). So the plaintiff had judgment.

(1) That he may recover it in 13 & 14 Geo. 2. cited *ib.* 135, ejectment *vide Goodtitle ex dem.* 136. 143. 3 Com. Dig. *Chimin, Chester v. Alker*, 1 Burr. 133. (A. 2.) 27. See also *Selman v. Courtney, Tr.*

Between the Parishes of Denham and Dalham in Suffolk.

Two houses in an extraparochial place are not enough to denominate a ville. Burr. Sett. Ca. 35. and Sess. Ca. Ed. 1750. vol. 2. p. 250. No. 171. S. C. Cal. temp. Hard. 102. Cunn. 163. S. C.

UPON a special order it was stated, that Walker hired a farm in Denham above 10*l.* per annum, and lived on it from 1725 to 1730, and paid parish rates; that then he went and lived for several years on 150*l.* in Southwold, which is an extraparochial place consisting of two houses and 300 acres of land belonging to and in the occupation of different persons. But it not appearing there had been any overseers of the poor, the sessions confirm the order of two justices for sending him to Denham.

Strange moved to quash both, it having been determined, *Salk.* 486. and in the case of *Rufford* (*ante* 512.) that a settlement may be gained in an extraparochial place containing more houses than

than one, so as to come under the denomination of a *ville* or township, the power in 43 *Eliz. c. 2.* in parishes being by the statute 13 & 14 *Car. 2. c. 12.* extended to all townships and villages.

Sed per curiam, That was a pretty liberal construction on the statute, which plainly related to townships in large parishes; but ^{two} * houses are not enough to bring it within the denomination of a *ville* or township, 1 *Inst.* 115. It must consist *de pluribus mansionibus et vicinis*, and should have a petty constable. 1 *Mod.* 78. This does not appear to have the reputation of a *ville*. So the orders must be affirmed (1).

*See post. 1071.
five houses,
n. to 2d. ed.

(1) *Rex v. Shewler and Atter*, *bitants of Belvoir*, 2 *Seff. Ca.* 111.
3 *Burr.* 1391. *Rex v. The Inhab.* pl. 105.

Crew qui tam *vers.* Saunders.

[1005]

AN action was brought against the defendant on the statute 9 *Ann. c. 10. § 44.* for intermeddling in elections, being post-master at *Nantwich*. And it was moved on behalf of the plaintiff for liberty to inspect the post-office books, and take a copy of his deputation.

No access to
books of post-
office in colla-
teral actions.

This was opposed by *Strange* on behalf of the post-office, who were no parties to the suit. And he cited *Hil. 12 Ann.* where the college of physicians sued *Dr. West* (a) for practising without licence, and he was denied leave to inspect the books; and *Trin. 11 W. 3. Underhill v. Durham* (b), where in ejectment the plaintiff claimed under a bishop's lease made before the restraining statute, to commence on the expiration of a former, which the plaintiff could not produce; and he was denied to inspect the books of the dean and chapter, they being no parties. And likewise the case of *Shelling v. Farmer*, *ante* 646.

(a) Cited 1 *Will.*
240. *Granvill*
v. Burrell, 1 *Ld.*
Raym. 252.
Salk. 44. *S. P.*
(b) *Freem.* 509.
Rep. also 1 *Salk.*
256. but not
S. P. Holt 264.
Colles P. C. 338.

Bootle contra compared it to the case of court rolls, and entries in the custom-house, bank, and *South-sea* books. *Sed per curiam*, Inspecting court rolls was the original of these motions; but then it was confined to the case of persons interested, the rolls being the common evidence, which of necessity must be kept in some one hand. But lords and tenants of different manors have always been denied as strangers. In the case of publick companies it is restrained to the entry which concerns the party himself. And as to the custom-house, they are really the merchants books for that purpose. The constitution of the officer is private,

vate, and therefore not necessary for the plaintiff to prove; and as against the defendant, his acting will be sufficient. The plaintiff took nothing by his motion (1).

(1) *Benson v. Port*, cited in *nity of Hostmen*, *post*. 1223. and *Wilf.* 240. *Vide Rex v. Corne-* the cases there cited.
lius, *post*. 1210. *Rex v. Frater-*

Dibben vers. Cooke et al.

8 & 9 W. 3.

c. 11.

Trespass on the case is not within the statute *W. 3.* that gives costs to an acquitted defendant (1). *Cann*, 132. *S. C.* but no decision.

[1006]

AN action on the case for a nuisance was brought against two defendants. There was judgment by default against one, and the other on Not guilty was acquitted. And the question was, whether he was intitled to his costs.

And upon consideration the Chief Justice delivered the opinion of the court, that he was intitled to no costs. Before the statute 8 & 9 W. 3. c. 11. if one defendant was acquitted, he was not intitled to his costs; the courts construing the former acts to relate only to the case of a total acquittal of all the defendants. This being inconvenient, the 8 W. 3. c. 11. came and gave costs where one of the defendants is acquitted, unless the Judge certifies a reasonable cause to make him a defendant. And that act extends to trespasss, assault, false imprisonment, and ejectment. The present action is trespass on the case: and though that be a species of trespasss, and in the case of the statute of Limitations, the word *trespass* in the proviso has been extended to actions on the case; yet considering these acts giving costs have always been looked on as penal acts not to be extended by equity, and therefore an avowant not within the word plaintiff, *Carth.* 179. we must take it only to mean the general sort of trespasss *vi et armis*, 10 Co. *Marbalssea* case. And he said this was the rule in *C. B.*

(1) *Vide* the authority of this field in *Ingle v. Wordsworth*, 3 case relied upon per Lord Mans- *Burr.* 1287.

Dominus Rex vers. Episcopum Landaff.

In a *quare impedit* the crown as well as the subject must allege a presentation.

ERROR of a judgment in the court of grand sessions in Wales in a *quare impedit* brought by the King against the bishop of Landaff, Francis lord Brooke, and Thomas Humphreys, a *commendam retinere* does not amount to one. But where the verdict finds that the crown was seized *in fee ut de uno Grosso* it cures the want of the allegation. 2 Barn. B. R. 72, 189, 371. 2 Kely. 875; S. C.

clerk,

clerk, for the church of *St. Andrew* in the county of *Glamorgan*. The count set forth the statute 25 H. 8. c. 21. against suing to *Rome*, and empowering the archbishop of *Canterbury*, under particular restrictions, to grant licences and dispensations, that used formerly to be sued for to the bishop of *Rome*. That Queen *Anne* in right of her crown was seised of the advowson in gross, and *John Tyler* being elected bishop of *Landaff*, the Archbishop of *Canterbury* 24 June 1706. (the church being then vacant) by his letters patent of dispensation, reciting that the new elected bishop had represented the revenues to be too small for the dignity, prayed for a dispensation to hold this church and other ecclesiastical preferments in *commendam*; the Archbishop accordingly grants the same, provided they were confirmed by the crown. Then sets forth a confirmation under the great seal duly inrolled, by virtue whereof *Tyler* became capable to retain the said church in *commendam* with his bishoprick to which he was promoted; and whilst he continued parson Queen *Anne* died, and *George* 1. succeeded, in whose time the church became void by the death of *Tyler*; unde it belonged to the late King to present, who died during the vacancy, and it descended to his present Majesty, who ought to present, but is hindered by the defendants.

The bishop's plea is, that he claims nothing but as ordinary. The Lord *Brooke* pleads in bar, that *William* Lord *Brooke* his father was seised of the moiety of the manor of *Dinas Powys*, in his demesne as of fee, to the moiety of which manor the half of the advowson of this church belongs, to present in every second turn; and the church being void he presented the other defendant *Humfreys*, who was instituted and inducted, and is parson thereof; and the advowson on the death of the father descended to the present Lord *Brooke*; and traverses the seisin of Queen *Anne* as laid in the count.

[1007]

The defendant *Humfreys* pleads in the same manner; and there is the common replication, and judgment on the plea of the bishop; and then the Attorney General takes issue on the traverse of the Queen's seisin; which on trial is found for the crown, and judgment entered for the King, on which the general errors are assigned.

This cause was argued several times at the bar before the death of Lord *Raymond*, and the opinion of the court given in favour of the plaintiff in error on the three points under-mentioned. But the fourth point upon the verdict being then started, it stood over to be argued upon that only. Then the Chief Justice dying, it was thought proper to be argued again at large. And my argument for the plaintiff in error taking in all that was said on that
side

side of the question, and the resolution of the court being an answer to it, there is no occasion to report any more of this case.

Strange pro quer' in errore argued, 1. That generally in a *quare impedit*, which is a possessory action, the crown as well as the subject must shew a presentation: and though there may be cases, wherein it is not required, as being impossible; yet those are considered as exceptions to the general rule, and the particular circumstances must be shewn, to bring it out of the general rule, and within the exception, by counting on the special matter. 2. That this is not a *commendam accipere*, but a *commendam retinere*. 3. That though a *commendam accipere* does amount to a presentation, yet a *commendam retinere* does not. 4. That if these points are with me, then it will come to the question, whether the joining issue on the seisin alleged in the count, and the verdict finding the Queen to have been so seised, does not cure the defect in the count in not alleging the presentation, which I shall contend it does not.

I am to shew, that in a *quare impedit* the crown as well as the subject must shew a presentation, it being a possessory action, and that though there may be cases wherein it is not required as being impossible, yet these are considered as exceptions to the general rule, and the particular circumstances must be shewn, to bring it out of the general rule, by counting on the special matter.

[1008]

16 H. 7. 3. a.

F. N. B. 33. *H.* runs thus: a man shall not have a *quare impedit*, if he cannot allege a presentation in himself or in his ancestors, or in any other person from whom he claims the advowson, and that in his count, unless in some special case; as if a man at this day erect a church parochial by licence from the King, which shall be presentable; if he be disturbed to present the same, he shall have a *quare impedit* without alleging a presentation in any person, and shall count upon the special matter. And under the subsequent letters *I.* and *K.* he puts two other instances, in both which the want of alleging a presentation may be excused by counting upon the special matter. So in 2 *Roll. Abr.* 378. pl. 1. if the King be intitled to an advowson by office, he shall have a *quare impedit* without a presentation, for the office puts the King in possession, and any one else out of possession. So in pl. 5. if the King is seised of an advowson which has been always in proper use, he shall have a *quare impedit* without alleging a presentation. And in 2 *Roll. Abr.* 376. *R.* 1. it is said, this writ is intirely in the possession, and the presentment is the possession. In *Vaugh.* 53, 56, 57. it is held, that unless it be in special cases, both seisin and presentation are necessary to be alleged, and a seisin without a presentation, or a presentation without a seisin, are equally naught; and the law (says the book) is the same in the case of the King as a subject. Agreeable to this is 2 *Roll. Abr.*

378. *pl.* 6. if the King has cause to present, by having the temporalities of the bishop, he shall not have a *quare impedit* without alleging a presentation. And in the case before cited *pl.* 5. it is implied, that the King must make his excuse as well as a common person. The precedents of *quare impedit* brought by the crown fall in with this. *Vaugh.* 53. *Skinn.* 651. *Co. Ent.* 493. *a.* 494. *a.* 509. *a.* 512. *a.* 514. *a.* 516. *b.* 520. *b.* *Raft.* 505. *a.* 528. *a.* 528. *b.* 529. *b.* 530. *a. b.* 531. *a.* *Lutw.* 1078, 1083. 1090. *Lev. Ent.* 144. 14 *Hem.* 4. 36. *b.* There are many others in every book of entries, under the title *quare impedit*, all which shew the opinions of those who were concerned for the crown, else they would never have fallen into a course of precedents contrary to the prerogative, which in other parts of pleading is constantly maintained. And these verify what Lord *Vaugh.* 57. says, that the books and precedents all shew the law to be the same in the case of the King as of a common person. And no stronger argument can be brought to prove it so, than the adjudged cases which are exceptions out of the general rule; which would never have borne any debate, if that short answer could have been given, that the crown is in no case obliged to allege a presentation. And the drawer of this declaration seemed to be aware of this, and has therefore set forth the affair of the *commendam*, in hopes that may amount to an allegation of a presentation. But that I hope will not do when it is considered,

2. What sort of a *commendam* this is. And I insist it is a *commendam retinere*. The words of it are so, that he thereby became *capax retinere*. This point I believe will not be disputed, and therefore I shall pass to the third.

[1009]

3. That though a *commendam capere* does amount to a presentation, yet a *commendam retinere* does not. Lord *Hob.* 143. in the great case of *Colt v. Glover*, will not even allow such an instrument as this to be called a *commendam*; he says it is only a faculty of retention and continuation of the benefice in the same person and state wherein in it was, notwithstanding something intervening, as a bishoprick, or the like, which without such a faculty would have avoided it: so a *commendam* it is not, for my own benefice cannot be commended unto me; and the difference (*Hob.* 156.) between *retinere* and *capere* is no less than holding what is already my own, and taking that which is another man's. One of the points determined in the case of the *King* against Dr. *Birch* was, that the *commendam* or dispensation to hold the living for some time, was not a presentation; but that the crown should have its prerogative turn after the dispensation expired. There is a great deal of difference between a presentation, which must be followed by institution and induction, and this

L. Raym. 23.

this dispensation, which supposes the church to be full already, and prevents its becoming void. Since therefore here is an attempt to shew how the crown became seised, and that allegation does not shew a possession, which can only be shewn by a presentation; there is no room to say, that this dispensation is sufficient.

4. The last point to be considered is, whether the taking issue on the seisin alleged in the count, and the verdict finding the Queen to have been so seised, does not cure the defect in the count in not alleging a presentation. And I shall contend it does not. I admit there have been cases, where a verdict has cured the want of a material averment. But then those cases have been where the issue joined was such as necessarily required the proof of that fact, and without which proof the jury could not have given the verdict. And that I take to be the foundation of this healing quality in a verdict.

Now to consider the case as it stands upon these pleadings. Two things were necessary to be alleged. 1. The seisin. And 2. The presentation: the first to shew the right, and the second the exercise of it. Had both these been alleged, the defendant would have had an opportunity of traversing either; and if he could have over-thrown either, the crown could never have recovered. Which-soever of these he had traversed, the proof must necessarily have been confined to that: and in a traverse of the seisin there would be no occasion to prove a presentation; because a man may be seised in fee of an advowson, though he never presented: and in a traverse of the presentation he need only confine his evidence to that matter of fact, without meddling with the seisin. In *Skin.* 675. Lord Holt says, the presentment is the proper matter to be traversed. But if this count is good, it enables the owner of the fee to recover in *quare impedit*, though there never was that possession which is necessary in a possessory action: for he will allege no presentation, to give the other an opportunity of denying it; but count only on the seisin, and drive him to take issue on that only; and then set up the verdict, to cure the actual want of the other. If the court keeps to the effect of a verdict, as I contend, there will then be some rule to go by; but if they once leap over those bounds, it will be hard to know where to stop. In *Salk.* 662. the plaintiff declared, that the defendant kept a bull, that used to run at men; but did not say *scienter*: and held naught after a verdict, for the action lies not, unless the master knows of this quality; and we cannot intend it was proved at the trial, for the plaintiff need not prove more than is laid in his declaration. This case proves, that they go upon the presumption of its being proved at the trial.

trial, where it is necessary so to be. 1 *Sid.* 184. trespass for taking a hook: the defendant pleaded, he had a way to a wood over the land of the plaintiff, and was stoppt by the plaintiff, who struck at him with the hook, upon which he took it out of his hand: they went to issue on the right to the way, and found for the plaintiff: and moved in arrest of judgment, that the plaintiff had not shewn the hook to have been in his possession: and held by all the court, that if the trial had been on Not guilty, it would not have been helped, but here the defendant had by his plea shewn it to have been in the plaintiff's hand, and that he took it out. There is nothing of that nature in our plea, or that admits a presentation by the crown. The issue therefore to be tried not requiring the proof of a presentation, or its being admitted from the nature of the issue; I apprehend the want of such an allegation is not cured by the verdict, but the declaration remains still liable to that objection.

Lord *Hardwicke* delivered the resolution of the court.

In this case there are three things considerable. 1. Whether it be necessary to allege a presentation. 2. If necessary, then whether the *commendam* amounts to a presentation, or excuses the want of alleging one. And 3. Whether the verdict, which finds that the Queen was seised in fee, *ut de uno grosso*, cures it.

Upon the two first points the opinion of the court has been already intimated, and there is no occasion to say much upon them; only as it will be a proper introduction to the last. And we are all of opinion, that a presentation was necessary to be alleged, and the *commendam* will not serve the purpose; and therefore on those two points the plaintiff in error is right: but upon the third point we are of opinion with the defendant in error, that the verdict has set all right.

The authorities on which we found our opinion on the first point were cited at the bar out of *F. N. B.* the rules whereof are the foundation of what is delivered in *Hobart* and *Vaughan*, who are the authors that have entred the deepest into, and treat best of, this subject. By them it appears, that as to this point there is no difference between the crown and a subject. A presentation makes a fee, and proves a fee. To which I may add, that the law requires a plaintiff to shew, *coment* his seisin arose; this being incorporeal, and not to be executed by livery. Now a presentation makes a seisin, and shews at the same time how it arose, and is the proper evidence of it. 5 *Co.* 98. a. a presentation by the grantee of the next avoidance avails the grantor, and so is the case put of a seisin of services by a guardian or lessee for years.

years. And it appears by the divisions of *Rolle's* titles, 2 *Abr.* 376, 378. that he thought so, for he speaks of shewing a seisin by presentation. *Fitz. Quare Impedit* 171.

As to the second point it may be admitted without prejudice to this point, that a *commendam capere* amounts to a presentation; but this certainly is not such a *commendam*, and so the defendant's counsel seemed to admit.

The third and last point is upon the verdict, and that we all think has cured the not actually alleging a presentation.

2 Burr. 1161.
5 Com. Dig.
Pleader.
(C. 87.) 378.

The common learning is, that it cures a title defectively set forth, but not a defective title. The words of the statute 16 & 17 *Car.* 2. c. 8. are very strong, and on that act an actual amendment is never made, but the benefit of the act is attained by our over-looking the exception.

[1012]

I admit, that if a title is not implicitly found, it will be ill; but we think the title being found, which is a seisin; it necessarily follows, that a presentation must have been proved. 3 *Mod.* 162. The crown can only gain a seisin, as part of the ancient patrimony of the crown, or by a title from a subject. If the first, (which is rather to be presumed) then it must have been presented to before, or not. If presented to before, it is an actual seisin: the crown cannot be usurped upon, or put to its writ of right. 6 *Co.* 49. 2 *Inst.* 357. *Co. Litt.* 344. b. *Cr. Jac.* 123. If there had been no presentation before, there must have been a special case to have been counted on. If the crown derives its title from a subject, it must be either by usurpation, grant, or office. If by usurpation, that must have been by a presentation. If by grant, a presentation must have been shewn, or a special case to excuse it. If proof had been given of presenting the last turn, that would have been an actual seisin. If not the last turn, then there was a usurpation, and the crown could gain no seisin, and the verdict cannot be true. For at common law a usurpation was rather stronger than a disseisin on land; for the usurper gained the possession, and left the rightful patron a mere right: and in such case nothing could pass to the crown, either by grant or office, but a right to maintain a writ of right, and not a *quare impedit*. An advowson appendant may be gained by seisin of the manor; but an advowson in gross cannot be acquired, without that which is an actual seisin. 10 *H.* 7. 27. pl. 7. 1 *Leon.* 154. 1 *Mod.* 281.

The use of these cases is, that if the presentment admits the seisin in gross; it is to a common intent included in the verdict, and

If the true ground be, that it is only to shew, *coment* he was seized; it is one of the least defects a verdict can cure, because the existence of the thing is admitted, and the doubt only upon the manner of it. An heir must shew *coment* heir; but if he does not, and the other does not demur, the finding him heir will cure it. 1 Lev. 190.

We are all therefore of opinion, that though this would have been ill on demurrer, yet it is now cured by the verdict; and therefore the judgment must be affirmed.

William Lee, Esq;
 Sir Edmund Probyn, Esq.
 Sir Francis Page, Esq.

Dudley Ryder, Esq. Attorney General.
 John Wilkes Esq. Attorney General.

Now say, Colwell et al v Churchwardens of St Mary's
in London.
The churchwardens of St Mary's Church, London, were
sued by the Rev. John Colwell, who was the owner of four tenements, which he
erected upon the site of the old building, and had been used as
a school-house, for though intruding on the site of the church, yet it was a
properly erected building, and did not injure the church, or its service,
and the court held, that the churchwardens were bound to allow the
tenements to remain, and that the churchwardens were liable for the cost of
the repairs.

(1) *Handwritten text, mostly illegible due to blurriness.*

Easter Term

8 Georgii 2 Regis. In B. R.

Philip Lord Hardwicke, *Chief Justice.*

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

William Lee, *Esq;*

} *Justices.*

John Willes, *Esq;* *Attorney General.*

Dudley Ryder, *Esq;* *Solicitor General.*

Pew *vers.* Creswell et al' Churchwardens of St. Mary Rotherhithe.

Bounds of the church-yard not triable in the spiritual court. 2 L. Raym. 212.

PEW was libelled against in the spiritual court for a nuisance and incroachment on the church-yard; to which he pleaded, that he was the owner of four tenements, which formerly stood on the ground in question, and that his present building was upon the old foundation, and did not project further. And this not being a matter properly triable there, a prohibition was granted; for though interrupting the use of a church-yard, as a church-yard, is properly cognizable in the ecclesiastical court; yet the bounds of it, which is matter of freehold, ought not to be determined there (1). *Vide F. N. B. 51. A. 2 Roll. Abr. 137. pl. 4. 1 Roll. Rep. 12. Mo. 413. 1 Sid. Butler v. Yelman.*

(1) *Hilliard v. Jefferson*, 1 Ld. *Witcher v. Cheslam*, 1 Will. 17 Raym. 212. In *Bishop of St. David's v. —*, *ib.* 443. *Vide also* 111. 6 Com. Dig. Prohibition. (F. 2.)

Dominus Rex *vers.* Esfman.

AN order was made at the sessions, for discharging an apprentice; the master having used him unkindly, and refusing to provide for and entertain him. *Et per curiam*, This order must be quashed, not for want of an original jurisdiction in the sessions, which has been often allowed them; but because it does not appear the master was present or summoned, which it is plain the act intended he should be. Besides, there is another fault, which is, that the reason given in the order is not a ground for their proceedings; for there is a power to oblige the master to receive and entertain him, and using him unkindly is too loose. *Vide Trin. 12 Geo. 1. Rex v. Davis, ante 704.*

Apprentice cannot be discharged without appearance or summons of the master. *Ann. Rep. 101. S. C.*

[1014]

Using him unkindly is not sufficient.

Between the Parishes of Whaddington and Tedford in Lincolnshire.

ON a special order of sessions, it was stated, that the *pauper* contracted for the purchase of a house in *Whaddington* for 39*l.* and paid 9*l.* out of his own money, and the remaining 30*l.* was by his order paid by another person, to whom the premises were mortgaged for it: that the *pauper* had lived upon it four years, when the mortgage was foreclosed, and he turned out: and the question being, whether he had gained a settlement hereby, the sessions adjudge that this was a fraudulent purchase, and consequently no settlement gained thereby.

Though part of the purchase money is advanced by another, yet if there is no fraud, a settlement may be gained on 9 Geo. 1. c. 7. *Burr. Sett. Ca. 57. and Sett. Ca. Ed. 1750. vol. 2. p. 237. no. 164. S. C.*

Sed per curiam, The order must be quashed: the purchase money by 9 Geo. 1. c. 7. need only be 30*l.* and the advancing the money by another makes no alteration. And the fact being specially stated, we can judge as well as the sessions, whether it be fraudulent or not. The circumstance of his continuing four years ousts all presumption of fraud (1).

(1) *Vide* the distinction between a case where fraud is found generally, and where the facts are specially stated, and a conclusion of fraud is drawn from them by

the justices, most clearly explained by Lord Hardwicke in this case. *Burr. S. C. 60. Rex v. Woodland, 1 Term Rep. 261.*

Between the Parishes of St. Maurice and St. Mary Calender in Winchester.

Executing office
of constable set-
tles certificate-
man.

Burr, Sett. Ca. 27,
and Sett. Ca. Ed.
1750, vol. 1.
No. 315.

2 Bott by Const.

285. pl. 296. S. C. and much fuller. Ante 411. 544.

UPON a special order of sessions, it was held, that executing the office of constable in the city at large, gave a certificate-man a settlement in that parish where he inhabited; though he was appointed by the corporation in general, and acted through all the parishes in the city; for he executes an annual office in the parish, which are the words of the statute.

[1015]

Jenkins *vers.* Bates.

Where error
abates by the act
of the party ex-
ecution shall go.

THE plaintiff in error married, whereby her writ abated; and this being by her own act, and not the act of God, the court gave leave to the defendant to take out execution, without giving time to the plaintiff to bring any writ of error *contra vobis* (1).

(1) *Buller v. Luffitano de Pinna*, ante 880, S. P.

Bourn *vers.* Mattaire,

Replevin for 14
skimmers and
ladles, certain
enough. *Caf. temp. Hard.* 119. S. C. much fuller *Bull. L. N. P.* 53. 4 Bac. Abr. 385. 5 Com.
Dig. Pleading, (3 K. 10.) 1754.

IN replevin, it was held to be certain enough, being for 14 skimmers and ladles, without saying how many of each (1).

(1) *Kempster v. Nelson, Gilb. Rep. in B. R. cited Caf. temp. Hard.* 121. acc. The principle on which it was held good was that though such a declaration would be ill on demurrer, yet the pleadings had supplied the defect, because the avowant having avowed the taking, had thereby taken upon himself the knowledge of what the goods were. *Caf. temp. Hard.* 121. *Bull. L. N. P.* 53.

Dominus Rex *vers.* Francis et al^s.

A taking in the
presence is a
taking from the
person and fe-
lony, but in spe-
cial verdicts it must be expressly found that the party robbed was present at the taking up. *Caf. temp. Hard.* 113. *Comyns* 478. *Doug.* 412.

THE defendants were indicted at the assises in *Somersetshire*, for that they feloniously made an assault on *Samuel Cox* in the King's highway, and put him in fear, and *q. l.* in money.

Caf. temp.

from

from the person of *Cox* did take, steal, and carry away. Upon Not guilty plead'd by all the defendants, the jury find this special verdict:

That *Samuel Cox* travelling on horseback on the King's highway to *Somerton* fair, on a place called *King's down Hill* in the county of *Somerset*, saw all the prisoners in company together, one of whom was then lying on the ground: that *Cox* passed by them, and one of them (but which the jury do not know) called to *Cox*, and desired him to change half a crown, that they might give something to a poor *Scotchman* then lying on the ground, who was one of the prisoners. *Cox* came back, and putting his hand in his pocket to pull out his money in order to give them change, as they desired, he pulled out four moidores and a *Portugal* piece value 3 *l.* 12 *l.* and having the pieces of gold in his hand, *John Francis*, one of the prisoners, gently struck *Cox's* hand, in which he held the gold, by means whereof the gold fell on the ground: that thereupon *Cox* got off from his horse, and said to the prisoners, that he would not lose his money so; and the said *Cox* then and there offering to take up the pieces of gold, which were then upon the ground, and in *Cox's* presence; the prisoners then and there swore, that if he touched the pieces of gold, they would knock his brains out; whereby he was then and there put in bodily fear of his life, and then and there desisted from taking up the pieces of gold. That the prisoners then and there immediately took up the gold, and got on their horses, and rode off with the gold; that *Cox* immediately thereupon pursued them, and rode after them for about half a mile; and then the prisoners struck him and his horse, and swore that if he pursued them any farther, they would kill him; by reason of which menace he was afraid to continue his pursuit any farther; but whether upon the whole matter the prisoners are guilty of the felony and robbery charged on them, the jury doubt, and pray the advice of the court. *Et si, &c.*

[1016]

This special verdict and the prisoners were removed into the King's Bench, where it was twice argued at the bar. And upon the first argument the only question was, whether a taking in the presence be in point of law a taking from the person, and it was unanimously determined that it was.

But then a doubt arose (which occasioned the second argument) whether it was sufficiently found to have been taken in the presence of *Cox*, it not being said so in express words: and after it had been argued in *B. R.* upon this point, it was ordered to be argued again at *Serjeants'-Inn-Hall* before all the Judges of *England*, where I attended on behalf of the prisoners

against Mr. *Huffey*; who argued for the King, and insisted that here was sufficient found to constitute the crime of robbery, it being found that *Cox* was put in fear, and that the money was in his possession, till one of the prisoners struck it out of his hand; and the finding that the prisoners *immediately* took it up, excludes all possibility of *mesne* acts, such as *Cox's* going away before they took it up; and that to excuse them it should have been expressly found, that *Cox* did go away before the money was taken up.

[1017]

Strange, contra, I shall not dispute but that a taking in the presence is a taking from the person, and consequently a robbery, where it is accompanied with the other necessary circumstances. But the question here is, whether this is found to be a taking in the presence of *Cox*. It is unnecessary to cite cases, to prove that on these verdicts nothing is to be intended: Judges have always guarded against that with great caution. It has gone so far, that where it stands indifferent which way the fact is to be taken, the turn of the scale is never given against the prisoner. And therefore in *Keat's* case, 5 *Mod.* 287. *Skin.* 666. where on an indictment for killing his gardener the jury found that the master struck the gardener, and the gardener struck the master, and the master gave him a mortal wound; the Judges would not determine that the master struck first, so as to make it murder: and yet from the manner of finding any one would be led to collect, that the first blow was given by the master. It must be agreed that here is no finding in express words, that the taking was in his presence. But it is contended that here is that which is tantamount. Now I insist, that how great room soever here is to infer the presence of *Cox*; yet it not being found as a fact, that he was present at the taking up the money, and that being a circumstance material to constitute it a robbery, the prisoners must be discharged.

In the acts found there must necessarily be a priority and posteriority in time. *Cox* got off from his horse, offered to take up the money, was threatened and put in fear, and then and there desisted from taking up the gold. The manner of this desisting is not found, and therefore may naturally be inferred to be by going away.

The next fact found is, that the prisoners then and there immediately took up the gold, got upon their horses, and rode off. *Immediately* must mean, that the next thing done after *Cox's* desisting, was the prisoner's taking up the money, but this does not determine how soon that was after the desisting. Consider it as opposed to the word *mediately*, and it will shew this to be

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right construction. It is not found when Cox got upon his horse, or whether he had his horse in his hand, or it was standing at a distance. It is said he *immediately* pursued them, by riding after them; this shews that *immediately* does not in this verdict mean the same as *eo instante*, for Cox must have had time to mount, and observe which way they went, before he could pursue. The Latin word *immediate* is not only rendered *immediately*, but also *forthwith*, and *by and by*, and in writs that are returnable *immediate* it means as soon as may conveniently be, and without delay. If it stood upon the words *then and there* only, the legal operation of them is always taken to denote the same day and place, for a *venue*; so that to make this good the whole reliance must be upon the word *immediately*. It is not found, that Cox so much as knew they had taken up the money, for the words *that he would not lose his money so*, refer to the striking it gently out of his hand, whereby it fell to the ground. When he remounted and pursued, he did not declare it was because he would not lose his money, but he might pursue them on account of the assault in striking his hand. All the authors who hold taking in the presence to be a taking from the person, speak of it as a taking openly. And before his face. *Stanf.* 27. *H. P. C.* 73. 3 *Inst.* 69. *Hawk.* 96. *Sti.* 156. Now no body can say, but that on this finding it is impossible the money might not be taken up in the presence of Cox; and if there is but a bare possibility of that, his presence is not to be inferred. In the case of Mr. *Huggins* it was attempted to infer his consent to the dures of *Arne* from circumstances found in the verdict; but the court said, though there was ever so strong an evidence of consent, yet consent was a fact, and they could not judge on evidence of a fact. Whether this was taken up in Cox's presence is a fact, and I admit there is strong presumptions of it, and that a man must be acquainted with the laudable exactness required in these proceedings, to start such an objection on this verdict. But to one acquainted with the nature of them, and the aversion Judges have always shewn to infer facts from evidence, I apprehend the objection must have great weight.

Ante 882.

[1018]

Supposing it therefore uncertain, whether this taking was in the presence of Cox or not; I apprehend there can be no doubt, but that the court must give judgment for the prisoners. That is, they must give such a judgment as the law would warrant, if it had been found, that the taking was not in Cox's presence: and that is, that the prisoners are Not guilty on this indictment.

It would have been a circumstance very material in the case of *Plummer* (*Kelyng* 111.) to have found that the suzee was discharged against the King's officers; but the jury were silent as

to that, and the court said they could not take the fact to be so on bare evidence of the fact, but proceeded to give judgment, as if the fuzee had not been discharged against the King's officers, without sending it back to the jury to find it positively one way or the other. So in the case of *Messenger et al'* (*Kelyng* 79.) who were indicted for high treason in assembling and pulling down bawdy-houses, the verdict was silent as to *Green* and *Bedell*, whether they were aiding and assisting; and this, says *Kelyng*, being a matter of fact, which ought to be expressly found by the jury, and not left to the court upon any colourable implication from their being present, they two were discharged, without sending it back to the jury for their further opinion as to the fact. In *Kelyng* 66. on a special verdict it was found, that *Thompson* and his wife were fighting, and *Dawes* endeavouring to part them was killed by *Thompson*; and it not being found that *Thompson* knew *Dawes* only intended to part them, it was held manslaughter, without sending it back to the jury to be certified of his knowledge. *Keat's* case before cited was so uncertain, that the court could not determine who struck first; and yet *Holt* Chief Justice was so averse to a *venire facias de novo*, that he took exception to the indictment, and it was quashed. And after this, was the case of *Plummer*, where *Holt* could not find a flaw in the indictment, and so the verdict stood. The case of *Mr. Huggins* is not a direct authority, because the Judges said there was no uncertainty; but it plainly appeared, what their judgment would have been, if they had thought the verdict uncertain. In that case it was found, that *Huggins* was once present at the room, and saw *Arne* under the duress *et adtunc et ibidem seipsum avertit*, *Anglice* turned away, and that *Barnes*, *eodem tempore quo prae'* *J. Huggins seipsum sic ut praefertur avertibat*, locked the door. Now *eodem tempore* is stronger than *immediate*, and yet in that case the court would not consider this as a shutting up *Arne* with the consent of *Huggins*, there being a possibility that the door might be locked by *Barnes*, and he not know it. It was there found, that he saw him. *sub duritia imprisonamenti illius*; and yet the court would not infer his knowledge of the circumstances from thence. In the present case it is considerable, that here is a possibility, the prisoners may be innocent of a robbery. The court are not to judge on probabilities, but positive facts. It is not positively found, that the taking up was in *Cox's* presence. And therefore I hope the prisoners shall be discharged.

[1019]

After this argument the Judges took time to consider it. And this term the Chief Justice declared, that all the Judges, except *Carter*, *Comyns* and *Thompson*, who only doubted, were of opinion, that the fact of *Cox's* presence at the taking was not sufficiently found, though there seems to have been evidence enough

to warrant such a finding. That the whole rested on the word *immediately*, then and there serving only for a *venue*, and immediately was a word too loose and uncertain. In *Stephens's Thesaurus* it is rendered *cito* and *celeriter*; in *Cowper*, *by* and *by*; and in other dictionaries *sine dilatione* and *presently*. In legal proceedings it does not exclude all *mesne* times and *mesne* acts. In *Oneby's* verdict it is used five times to different purposes. In *Mauwridge's* twice. On the statute 27 *Eliz. c. 13. § 11*, the notice for hue and cry must be in convenient time; and yet on declaring you aver that it was *immediate*, which is supported by proof of a convenient time. The cases cited shew, how nice the Judges have always been; and therefore, as here wants one necessary ingredient to make it a robbery, the prisoners must be discharged from this indictment.

2 Lev. 75.

Pybus v. Milford

However we all think this a grand larceny, and therefore cannot discharge their persons. But as we cannot give judgment for a larceny, there must be a new indictment; for we are confined to the doubt of the jury, whether this be a taking from the person of *Cox*.

When on arguing a special verdict for a capital offence it appears the defendants are guilty of a less crime, the court will not discharge them.

They must be remanded to *Somersetshire*. We discharged *Burridge* the other day, because there no species of felony was found.

Trinity Term

8 Georgii 2 Regis. In B. R.

Philip Lord Hardwicke, *Chief Justice*.

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

William Lee, *Esq;*

John Willes, *Esq;* *Attorney General*.

Dudley Ryder, *Esq;* *Solicitor General*.

} *Justices.*

Maundy *vers.* Maundy.

By a devise of
ground-rents on
leases for years
the reversion
passes (1).
Fitz. 70. 288.
S. C. in C. B.
Cas. temp. Hard.
142.
a Bernard, K. B.
302, S. C.

ON a special verdict in ejectment for houses in *Red-Lin-Square*, it was found, that *Ventris Maundy* being seised of the reversion in fee of the houses, which were of the value of 260*l. per annum*, but then let out on lease for sixty years at 22*l. per annum* called a ground rent, and having several sons and daughters, made his will in April 1696, in this manner, "In respect to my wordly estate wherewith it hath pleased God to bless me, I dispose of it as follows. To my son *Daniel* I give 4*l. per annum* of my ground rent:" and in like manner he parcels out the whole 22*l.* to his children (except the eldest) "his, her, and their heirs and assigns for ever; but as to *Ventris*, my eldest and undutiful son, I give him, in hopes

(1) So a bequest of "leasehold" well as the reserved rent. *Key v. Laxon*, 1 Bro. Chan. Ca. 76.
ground rents in S." passes the re-
versionary leasehold interest as

" he may reform, 5*l.* *per annum* due on blank tickets in the million lottery. And if any of my other children die, their legacy to go to the survivor, my said undutiful son excepted, who is to have no share or part thereof, nor no more share or portion than I have before given him."

The building leases being expired, the heir of *Ventris* the eldest son brought an ejectment, insisting that the reversion was undisposed of; and that however strong the intention to disinherit the eldest son appeared, yet if it is undisposed of, he must have it. But upon argument in *C. B.* judgment was given against him in favour of the devisees, and now that judgment was affirmed in *B. R.* [1021]

1. Because the intention to pass all his estate was plain from the introductory part, where he declares his will was in respect of all his worldly estate, and that part where he says what his eldest son shall have, and no more (1).

2. The limitation is to the younger children and their heirs; which cannot take effect, if their interest is only during the continuance of the rent. And nothing is more common, than for people to speak of their ground rents, when they mean the houses and lands out of which they issue.

3. The case of *Kerry v. Dethick* in *Mo.* 640. is express in point; and though in that case it is said, the defendant was advised to bring a writ of error, yet that does not impeach its authority.

(1) *Ibbetson v. Beckwith, Cas. temp. Talb.* 157. 160. *Scott v. Alberry, Com. Rep.* 337. *Denn v. Gaskin, Cowp.* 657. *Right v. Sidebotham, Doug.* 730. *Goodright v. Stocker, 5 Term Rep.* 13. Where it is laid down that though an introductory clause, " (that his will is in respect to his worldly estate) " would have some effect in the construction of subsequent devises, they will not of themselves carry a fee. See also 3 *Com. Dig.* tit. *Devise*, (N. 2.) 414. 8 *Vin. Abr.* tit. *Devise*, (T. a.) 227.

Valentine *vers.* Fawcett.

Writ of inquiry
awarded to supply
non-assessment of
damages.
Ann. 138. S. C.

THE defendant was an overseer of the poor, and was sued for what he did in execution of his office; and on the trial a verdict was given for him, and the statute 43 *Eliz. c. 2.* saying, that he shall recover treble damages by reason of his wrongful vexation, with his costs, to be assessed by the same jury, or writ to inquire of the damages, as the same shall require; he now moved for a writ of inquiry: which was opposed, for that it could only issue when the plaintiff was nonsuit, after which the same jury could not go on; whereas the plaintiff appeared, and a verdict was given.

But the court held the writ of inquiry should issue. *Vide* 11 *Co. Cheney's case*, *Carth.* 362. *Salk.* 205. 5 *Mod.* 118. *Yelv.* 176.

(1) *Freeman v. Lady Archer*, 4. *Mayor of Shrewsbury*, *post.* 1052.
2 *Black.* 763. *Dewell v. Mar-* 5 *Com. Dig. Pleader*, (Z. 1.)
shall, *ib.* 921. *Et vide Kynaston* 558.

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Michaelmas Term

9 Georgii 2. Regis. In B. R.

Philip Lord Hardwicke, *Chief Justice.*

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

William Lee, *Esq;*

John Willes, *Esq;* *Attorney General.*

Dudley Ryder, *Esq;* *Solicitor General.*

} *Justices.*

Marshall *vers.* Gibbs.

TO Not guilty in *assumpsit* the plaintiff demurred. *Et per* Not guilty in
curiam, Though it would be good after a verdict (1), yet *assumpsit*, ill on
it is ill on demurrer, and the plaintiff had judgment. 1 Lev. Cas. temp. Hard.
142. (2). 173. S. C.

- (1) *Vide Robinson v. Green, ante Raym. 90. Cro. El. 470. pl. 29.*
574. Sid. 236. pl. 3. 2 Barnes 252.
(2) *Noy's Rep. 56. Brownl. 8. 253. note 2d. edition. Vide also*
A. 77. Com. Rep. 10. Comb. Palm. 393. Bend. 154.
379. 380. Carth. 371. Ld.

Between the Parishes of Seaford and Castle Church.

ON a special order of sessions, it was stated, that the pauper
was hired for a year, which he served till the last twelve
days, when he went away without the master's leave, and staid
till after the year was up, when he returned for his cloaths, and
was

Going away
twelve days be-
fore the end of
the year prevent-
a settlement.
Burr. Sect. Cas.
68. S. C.

was paid the whole year's wages. And on consideration, that if they once allowed this absence for twelve days at the end of the year (which differed from an absence in the middle of the year, which was purged by taking him again) they should not know where to stop; it was determined that he gained no settlement (1).

(1) *Pawlet v. Birnham*, 2 Bott 151, ante 423. *Rex v. Preston*, 2 Bott 497. pl. 438. *Rex v. Godalming*, ib. 497. pl. 437. 2 Seff. Ca. 116. pl. 111. *Rex v. North Basbam*, ib. 517. pl. 460. S. P. and see *Rex v. Caverswall*, Burr. S. C. 461. *Rex v. Grantbam*, 3 Term Rep. 754. *Rex v. Claybydon*, 4 Term Rep. 100. But there may be an absence for the last days of the year, which will be no dissolution of the contract, and therefore the servant will gain a settlement. *Vide Rex v. Sulgrave*, 2 Term Rep. 376.

[1023]

Dominus Rex *vers.* Episcopum Litchfield and Coventry.

The bishop may take time to inquire into the character of one elected schoolmaster before he licences him. 2 Barn. B. R. 365. 428. And. 367. S. C. Argument on motion to supersede mandamus. 3 Kely. 287. Before the delegates. Com. 442. and vide 3 Burn's Eccl. Law 313.

A *Mandamus* issued to the bishop, to grant a licence to *Rusworth* a clergyman, who was nominated usher of a free grammar school within his diocese; to which he returned, that a *caveat* had been entered by some of the principal inhabitants of the place, with articles annexed, accusing him of drinking, incontinency, and neglect of preaching and reading prayers; and that the *caveat* being warned, he was proceeding to inquire into the truth of these things, when the *mandamus* came, and therefore he had suspended the licensing him.

And without entering much into the arguments, whether the bishop had the power of licensing; the court held, that the return should be allowed as a temporary excuse. For though the act of uniformity obliges them only to assent to and subscribe the declaration, yet it adds *according to the laws and statutes of this realm*, which presupposes some necessary qualifications, which it is reasonable should be examined into.

Goodtitle *vers.* Thurstout.

IN ejectment on demise of Lord Gower, it was held no cause of * challenge, that a knight was not returned on the jury, according to the case of *Holbourn v. Kingston* in the House of Lords (1).

Though the lessor is a Peer there need be no knight returned on the jury.

MSS.

Cited And. 133.
3 Bac. Abr.

(1) The reason for this determination was, that Lord Gower was not a party to the record. MSS. Note the challenge con-

tained an averment, that the ejectment was brought to try Lord Gower's title, and pursued at his costs. MSS.

252.
*N. B. This challenge is taken away by 24 Geo. 2. c. 12. note to 2d. edition.

Dominus Rex *vers.* Inhabitantes Bovindon in Hertfordshire.

IT was held, that payment to the poor does not give a settlement, unless the party was rated: for the rating is the act of the parish, and not the other. And the settlement arises from the parish's giving that evidence of their being satisfied of his ability (1).

Paying gives no settlement if not rated.

Burr. Sett. Ca. 71. S. C. by the name of *Rex v. Serrat*.

(1) *Rex v. Lancaster*, 19 Vin. 384. *Solingtonham v. Worpleston*, Fd. 128. *Rex v. Bramshaw*, Burr. S. C. 98. *Rex v. Lower Walton*, ib. 100. *Rex v. Stanlake*, ib. 627. *Rex v. Carshalton*, ib. 809. *Rex v. St. Cuthbert*, ib. 817. *Rex v. St. John's Southwark*, Cald. 62. S. P. See all the cases collected upon this subject, 2 *Bott by Const* from 226 to 280.

Franklyn *vers.* Reeve.

ERROR of a judgment *e C. B.* in trespass, where after recital of the writ, the plaintiff counted for taking and carrying away several loads of dung and soil, without saying *ipsius querentis*. And after verdict, that was objected, and held that this was such a defect of title in the count, as could not be aided by the verdict (1); which aids not a defective title, but only a title defectively set forth.

The recital of the writ may aid a defect in the count.

Caf. temp. Hard. 118.

Ante 1011.

(1) *Vide Yelw.* 36. 1 *Brownl.* 3 *Bull.* 303. 1 *Ld. Raym.* 239. 192. *Cro. Jac.* 46. *T. Raym.* 2 *Ld. Raym.* 890. acc. 395. 3 *Keb.* 524. 2 *Lew.* 156.

But

But though the count was held ill, yet the court thought it might be made good by the recital of the writ, which had shewn them to be the dung and soil of the plaintiff, and was to be taken as part of the declaration, according to the cases in *Cro. Jac.* 536. 1 *Sid.* 150. 187. 1 *Keb.* 699. 727. *Lutw.* 1509. 1 *Mod.* 219. And though it was agreed there was no original, (which otherwise they would have sent for up by *certiorari*) yet as the want of that was aided by the verdict, the judgment should be affirmed (2). [1 *Com. Dig. Amendment*, (D. 6.) 452.]

(2) According to the report *Cas. temp. Hard.* the court doubted how far the count could be helped by the recital of the writ therein, until they had the original itself brought before them by *certiorari*, and they awarded one to remove it. But as the present report is two terms posterior to that one, this seems to have been the final opinion of the court after there had been a return of no original. *Vide Goodright v. Hodgson, Andr.* 282. 5 *Com. Dig. Pleader*, (C. 12.) 326. (C. 86.) 378.

Dod ver. Saxby.

Where there are two executions the landlord cannot have a year's rent on each.

AFTER the landlord had had a year's rent paid out of the execution money according to 8 *Ann. c. 17.* there came in another execution; and the sheriff refusing to levy him another year's rent, he moved the court for a rule; but was denied, for the intent of the act was only to continue a lien as to one year, and to punish him for his *laches*, if he let more run in arrear. If the landlord had any thing to support his demand he might bring his action against the sheriff (1).

(1) On a rule to shew cause the case appeared to be, that two executions were in the sheriff's office, under which he levied and paid *Dod* the landlord a year's rent, and also the whole of the money on the first execution, and paid on the second, after which *Dod* obtained the rule for another year's rent, and thereupon the court discharged the rule, for *per cur'* when the first execution was

levied. Plaintiff accepted a year's rent, and now the sheriff has paid away the money levied, he would have another, which is unreasonable; if he was entitled to it, he should have insisted upon it then; as it is, the question is too difficult to be determined on motion if the sheriff has done the landlord wrong, he may bring his action *MSS.*

(1) The defendant in two actions, having a master in delegate will take the defendant's (1) The defendant in two actions, having a master in delegate will take the defendant's

Tipping *vers.* Smith.

AN award was made (reciting that the defendant had beat the plaintiff) whereby it was awarded, that the defendant should give security to pay the plaintiff an annual sum for life; and that all manner of proceedings (if any) depending at law should be no farther prosecuted. And upon demurrer this was held ill, being incertain, not final or mutual. It was incertain, because it did not determine what sort of security should be given: it was not final, it staying only proceedings then depending (if any); so that if the plaintiff had brought no suit, he was at liberty so to do, or even to discontinue what was brought, and bring new ones. And it was not mutual, there being no releases, or any thing awarded to be done by the plaintiff. So the defendant had judgment,

Award held ill for incertainty, and not being final or mutual. 1 Burr. 274.

Knott *vers.* Long.

[1025]

AN award that the defendant should pay what costs two persons named in the award (who were not officers of any court) should appoint for costs (1); provided they are such as a master in Chancery would allow; was held ill, for they can only delegate their authority in that instance to one who, the court will take notice, understands it better than themselves (2). The defendant had judgment on demurrer,

Award to pay costs to be taxed by one not an officer for that purpose, is ill. *Caf. Temp. Hardw.* 181. But see *Barnes*, 43.

(1) The award was that the defendant should pay such costs as two attornies G. and W. should tax, having regard to such costs as a master in Chancery would allow between complainant and defendant; the attornies did not tax the costs until after the time limited for making the award was expired and the action brought for the costs. The court held the plaintiff precluded from recovering upon two grounds, one on

account of the delegation of the authority, the other because the costs were not liquidated before the time for making the award expired, *MSS.* and see the report *Caf. Temp. Hardw.* to the same effect.

(2) *Vide Winter v. Garlick*, *Salk.* 75. 6 *Mod.* 195, *S. C.* *Stephenson v. Browning*, *Barnes*, 56. *Dudley v. Nettelfold*, *ante* 737. *Philips v. Knightley*, *ante* 903.

Hilary Term

9 Georgii 2 Regis. In B. R.

Philip Lord Hardwicke, *Chief Justice*,

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

William Lee, *Esq;*

John Willes, *Esq;* *Attorney General*,

Dudley Ryder, *Esq;* *Solicitor General*,

} *Justices.*

Hopkins verf. Neal and Newman.

Prochein amy no
witness.
Ante 506 (1).
Cal. Temp.
Hardw. 202.
S. C.

THE plaintiff sued as an infant by her father the *prochein amy*, for an assault and battery: and the father was refused to be a witness by Lord Hardwicke at *Nisi prius* in *Middlesex*, he being liable to the costs.

(1) See also *James v. Hatfield*, acc. per Chapple J. B. R. M. 1738, ante 548. *Millward v. Sterling*, 12 Vin. Abr. 8. pl. 21.

Dominus Rex verf. Pewtreffs et al'.

Cannot strike
counts out of an
indictment.
Ann. 303. S. C.

AN assault was laid twenty-one different ways. And on motion to strike them out of the indictment, the court said it could not be done, being the finding of the grand jury; but they thought

thought the clerks in the crown-office ought only to draw the indictments, and then the court could punish them for the vexation.

Cox *vers.* Robinson. [1027]

IN *assumpsit* the defendant pleaded a tender of four guineas, and brought the money into court: the plaintiff replied a subsequent demand and refusal, which on issue joined was found for the defendant; who thereupon moved the court to have his four guineas again; which was refused, for it is admitted so much is due to the plaintiff: and it is the same as if the money had been brought in on the common rule to strike it out of the declaration (1).

Money brought in on pleading a tender cannot be taken out by the defendant though he has a verdict. Temp. Hardw. 206, S. C.

(1) *Lane v. Wilkinson*, *Pract. Reg.* 250. *Caf. Pract. in C. P.* 36. *S. C. Crockay v. Martin*, *Barnes* 281.

Wallis *vers.* Smith.

PER *curiam*, Where common bail is filed by the plaintiff's attorney according to act of Parliament, that is not such a general bringing the defendant into court as to warrant delivering a declaration by the by. And to prevent mistakes, it would be proper to add to the bail-piece, that it was filed by the plaintiff pursuant to the act of Parliament.

12 Geo. 2. c. 29. Practice. *Caf. Temp.* Hardw. 207. S. C. more fully. *R. M.* 10 G. 2. *Reg.* 1.

Bulstrode *vers.* Gilburn.

IN *assumpsit* for money had and received to the plaintiff's use. It appeared, that the plaintiff was prothonotary of the palace court, and the defendant his deputy; and that by articles it was agreed what the defendant was to have, and he covenanted to account for the rest. These articles were before the statute 12 Geo. 1. c. 29. which requires affidavits to be made in order to hold to bail, and impowers the officer who issues the process, or his deputy, to administer the oath, and to take one shilling for so doing. The defendant from the making the act took the shillings, and passed several accounts with the plaintiff, who had

The principal and not the deputy is intitled to fees new created after the deputation. Plaintiff having remedy upon a covenant to account cannot bring *assumpsit* for money had and received (1). *Bull. L. N. P.* 131.

(1) *Vide Toussaint v. Martinant*, 2 *Term Rep.* 100. 1 *Com. Dig.* Action upon *assumpsit*. (F. 1.) 207.

never insisted to have those fees brought to account. But having now discovered that it was very advantageous, brought this action. And it was held by Lord Hardwicke, that though the defendant did the business, yet he ought to account with the plaintiff for the fee. For a deputy is intitled to no more than he stipulates for; and if he undertakes to execute the office, any subsequent addition to the duty of the office will not vary the contract, though it may be a reason to come to a new one. But he thought the present action not maintainable, the plaintiff having a covenant under hand and seal, which gave him a remedy of an higher nature, and upon that point had the plaintiff called.

[1028]

Then the plaintiff brought an action of covenant in *C. B.* which was tried before Chief Justice *Reeve*: and he being of the same opinion with the Chief Justice of the King's Bench, the jury by his direction found for the plaintiff. And upon allowing the defendant what they thought reasonable for his trouble, which was 400 *l.* they found 3000 *l.* for the plaintiff.

Dominus Rex vers. Justices of Peace of Middlesex.

Vagrant money ought to be raised quarterly, but a previous presentment of the grand jury is not necessary.

2 Sess. Ca. p. 361. no. 195. S. C. Vide 17 Geo. 2. c. 3. s. 33.

Order for raising vagrant money should specify the time for which it is to be raised, and they ought to be made quarterly or half yearly. Apts 700.

AN order was made at the quarter-sessions for raising 800 *l.* to defray the expences of passing vagrants. And the statute 12 *Ann. c. 23. § 13.* directing the same to be raised as money for county gaols or bridges is to be raised; exception was taken, that there was no presentment of the grand jury to warrant this order, and that is required with regard to gaols by 11 & 12 *W. 3. c. 19.* and as to bridges by 1 *Ann. c. 18. Sed per curiam*, The reason why a presentment was required in those cases is, because it is a matter arising upon view; but what is necessary for this purpose cannot be viewed by a grand jury, and therefore this exception was over-ruled.

But there was another exception for which the order was quashed, viz. because it was to raise so large a sum, and not said for what time: so that it may happen, that a man newly come out of another county where he has contributed, may pay in this county for a time when he was no inhabitant nor had any property there: these orders ought to be quarterly or half-yearly at least, within the reason of poor's rates, which are required to be monthly, lest a man should pay for a time when he is not a parishioner. For this fault the order was quashed.

The Bank of England *vers.* Morice.

THE plaintiffs declare against the defendant as executrix of *Humphrey Morice* her late husband, in case, for money had and received by him to the use of the plaintiffs.

Where a bond is forfeited in the life-time of the testator, the penalty is the legal

debt, and on the issue what is due must cover so much assets, but on a bond where the day of payment is not come, the assets only can be covered for the sum in the condition. Where an executrix pleads the penalties of three bonds, and the jury by special verdict find assets in one entire sum, if the court are of opinion that the penalties of two of the bonds are to be considered as the debt due, but that the third shall cover no more than the sum really due upon it, they may deduct such penalties, and sum due out of the assets found, and give judgment for the plaintiffs to recover the rest. 2 Barn. B. R. 183. 374. Ann. 219. 4 Bro. Par. Cas. 287. S. C.

The defendant pleaded a judgment, and several bonds, and articles entered into by Mr. *Morice*, particularly a bond to Sir *William Morice* in the penalty of 53,000 *l.* conditioned for the payment of 26,500 *l.* by instalments, all of which were past and paid at Mr. *Morice*'s death, except one of 5000 *l.* and another of 1500 *l.* the days of payment whereof were not come at the time of the plea: she also pleaded a bond to *Thomas Wilson* in 500 *l.* for the payment of 2,500 *l.* at a day before the death of Mr. *Morice*: and a like bond to *Duncan Campbell* in 3000 *l.* conditioned for the payment of 1500 *l.* at a day likewise past: and then concludes, that she had not more than 1000 *l.* assets to answer the said several sums by the said several bonds, articles, and judgment, due and payable. To which the plaintiffs replied, that on the day of exhibiting their bill she had assets of her late husband beyond what would pay and satisfy the said several sums by the said bonds, articles and judgment due and payable, whereby she could make satisfaction to the plaintiffs.

[1029]

And issue being joined hereupon the jury find a special verdict. That *Humphrey Morice* at his decease was indebted to the plaintiffs in 28,993 *l.* 8 *s.* 1 *d.* that the assets come to the hands of the defendant on the day of exhibiting the plaintiff's bill were 41,152 *l.* 2 *s.* 5 *d.* that the money payable by the conditions of the said three bonds, together with the penalties on all the other articles, and the judgment pleaded by her, amounted to 21,182 *l.* 10 *s.* which being deducted from the said 41,152 *l.* 2 *s.* 5 *d.* there remained the sum of 18,969 *l.* 12 *s.* 5 *d.* That she had not assets to discharge the penalties of those three bonds, nor were they discharged: and that if the penalties on those three bonds were not charges on the assets, then they find for the plaintiffs, that she had assets to satisfy them to the amount of 18,966 *l.* 12 *s.* 5 *d.* But if the penalties were charges upon the assets, then they find for the defendant.

D d 2

This

This cause was argued several times. And this term the court delivered their opinions: which resolution, together with my argument for the plaintiffs, will be sufficient to give a view of what was insisted upon by both sides.

Strange pro quer' argued, That on this plea and replication the defendant can cover no more assets on account of the three bonds, than the sums mentioned in her plea to be due by the conditions; and that in order to intitle the plaintiffs to recover, it was not necessary to prove assets to the amount of the penal sums.

To shew this I shall consider, 1. In what manner she might have pleaded these bonds; and, 2. In what manner she has pleaded them.

[1030]

As to the first, there are two ways of pleading: 1. As single bonds: 2. By setting out the conditions, and shewing what is due. The first method of pleading is what chiefly occurs upon the entries and reports: and I admit that if they had been so pleaded here, and she had made the same conclusion, that she had not assets *ultra* what was due and payable upon the bonds, whereon issue had been joined; it must have been necessary to over-reach the penalties, for the court could not have taken notice of them as penalties, but as subsisting debts. The consequence of this sort of pleading is to drive the creditor into equity, in order to discover what is the honest debt, and prevent the executor from covering assets for more. This proved a great grievance, and therefore the courts of law endeavoured to redress it; either by encouraging and recommending the second way of pleading, which is to shew the condition; or by suffering the plaintiff to set out the condition, and reply that the obligee would take less than the penalty, and that the bond was kept on foot by fraud: and a slight evidence has been admitted as proof of it, and courts have leaned so strongly against these pleas, that it has been held sufficient to falsify any part, and thereby intitle the plaintiff to judgment, as if he had falsified the whole. *Carth.* 196. 431. And this disinclination in courts of law to suffer executors to cheat the creditors by covering more assets than really had been applied, drove executors to state their case according to the real justice of it at once: which was by shewing, that the bonds were conditioned for payment of less sums, and that there was really so much due, which they craved an allowance of. This is the second way of pleading I mentioned, and stands much encouraged by the first instance of it, in *1 Vent.* 354. *Page v. Denton*, where the court said, that if men would plead their case specially, it would save many a suit in Chancery: and Chief Justice *Holt* recommends it for the same reason in *Salk.* 312.

In

In the present case the defendant has taken this advice, which is the second thing I proposed to speak to, viz. in what manner she has pleaded. The conditions of all the three bonds are set out, and a computation made by her of what is really due for the principal and interest on each; which (to take a given sum) I may say amounts to 8000 *l.* and this (says she) remains due and payable, and the bonds are still in force: and that she has administered all the assets but 1000 *l.* which is liable to the payment of the several sums by the bonds, articles and judgment due and payable.

I must admit, that she has not in words at length confessed that this 8000 *l.* is all that remained due, by adding the negative words *and no more*: but if that should be thought material to make a part of the case, I insist it must be so taken upon this plea. [1031] The rule of law is, that every man's plea shall be taken most strongly against the pleader, for he is presumed to know his own case best; and I am pretty confident that no case can be shewn, where the court either presumed there might be more due than the defendant shewed, or expected the plaintiff to reply that there was no more due. And it would be a trap if they should, for either it would be material in the replication to say so, or not. If it be material, then issue may taken on it, and the defendant by saying so much is due draws in the plaintiff to say there is no more, and proves the issue by falsifying his own plea. If it be not material, then it must be taken upon the plea, that the sum mentioned is the sum due and no more. In *Co. Litt.* 303. *b.* the rule is laid down, *ambiguum placitum interpretari debet contra proferentem*. If this then be necessarily implied on the plea, it must be taken in as part of the case, though not so averred in the replication. And as to replications, it is a general rule, that in all cases but the plea of *Nul agard fait*, it is sufficient for the plaintiff to meet the plea, and falsify the excuse. *Salk.* 138. and that we have done in the present case.

It is a general rule, that the same word in the same instrument, will, or record, must have the same signification; unless it manifestly appears, that there is a necessity to put a different construction. In the plea, what she says is due and payable on these bonds, &c. is (for instance) 8000 *l.* Says the replication, you have assets *ultra* what is due and payable by those bonds, i. e. assets above 8000 *l.* you can pay what you say is due, and have money to pay me also; the words of the replication are, *ad satisfaciend' separat' denar' pradi' per scripta obligatoria &c. debita et solubilia*. Now the word *pradi'* must refer to the last antecedent, which is the lesser sums and not the penalties. There is no dispute between the parties what is the sum due, the plain-

tiffs must submit to take it on her shewing, and upon that foot go into the account. And a man must be endowed with a very legal understanding, to conceive how it is possible, that the penalties can upon such pleading be said or understood to be taken into the account.

But the objection is, that at law the penalty is the debt, and therefore when the plaintiffs in a legal proceeding speak of what is due by the obligation, they must mean the strict legal debt, to be relieved against which there must be a suit in equity. And I own that there are cases, in which to many purposes it is so considered: but the laudable endeavours of courts of law, to let in as much equity as they can, have in this instance overcome that construction. It will not be disputed, but that upon the issue of *plene administravit* an executor can be allowed no more than the lesser sum and interest: nay where upon the present plea judgment was taken of assets *quando acciderint*, and a *scire facias* brought; the Chief Justice of the Common Pleas, before whom it was tried, would allow no more to be covered than a court of Equity would do. In the case of *Tully v. Sparks*, B. R. Pas. 3 Geo. 2. it came to be a question, what was the construction of the word *debt* in the acts about bankrupts: the case was, that the bankrupt gave a bond conditioned to leave *Martha Latimer* 400 l. if she married, and should survive him: both facts fell out so; and the executor of the bankrupt was sued, and pleaded the commission and discharge: and on argument it was much insisted, that the statute 5 Geo. 1. c. 24. had discharged the bankrupt from all *debts contracted*; and according to the rule of law, this was *debitum in presenti*, and consequently *then* contracted, and so released: the court allowed the general doctrine, that to many purposes it was so; but held, that in that instance another sense was to be put upon it, *viz.* a *demandable debt*, that being what was meant by the Parliament, and they were not bound down to the strict legal notion of a debt. In the present case I apprehend there is as little reason to bind us down to the strict legal notion, as in that.

In *Page v. Denton*, 1 Vent. 354. debt upon bond was brought against an executor, who pleaded that the testator was indebted to him by an obligation, the condition whereof was to pay rent, and that at the time of the testator's death there was 300 l. due for rent, and he had but 60 l. assets to pay such rent. The plaintiff replied, that but 30 l. was due for rent at the time of the testator's death, which the court held to be a good replication, although the penalty of the bond was forfeited at the time of the testator's death; for if a bond due to a stranger is forfeited, and this is pleaded by an executor, and that he has not assets *ultra*; it

[1032]

Ante 867.

it is a good replication to say, that the obligee would have taken his debt in full; and it shall be a bar for no more; and here the defendant ought to take but his debt due: and the court said, that if men would plead their case specially, it would save many a suit in Chancery. The true reason of this case must be, that by the defendant's disclosing in his plea the condition of the bond, and alleging that 300 *l.* was due for the rent, he thereby waived the penalty of the bond, and made his demand only for the rent: and if by such plea more was alleged to be due for rent than was really due, the plaintiff had a right to reply, that only so much was due. In the present case the defendant might have pleaded the penalties, without setting out the conditions; but by setting out in her plea the money due by the conditions, she shews that she did not intend to cover the assets with the penalties, but only for so much as would answer the conditions. That case therefore differs from the present in this respect, that there the plaintiff disputed the *quantum* of the rent by the plea alleged to be due, but here the plaintiffs were satisfied with the plea as to the monies alleged to be due by the conditions: and if the plea had been untrue with respect to the *quantum*, the plaintiffs might have replied that less was due; but instead of disputing that point, they have submitted to it. If the penalties can be insisted on, to what end are the conditions set out? they could only be set out in consequence of *Holt's* advice, to come at once into the justice of the case, without being intangled with a suit in equity. He could not mean, that after the conditions are set out, the penalties are still to cover. And there is no instance of replying *per fraudem* to such a plea, though frequently before; which shews it has been always understood, that the plaintiff is by that pleading delivered from the penalties, and it is brought to the question, what is really due: and when she says so much is due, and she can only pay that, and the other side says you have more than sufficient to pay what is due; it cannot be doubted, but that they both meant the same thing.

[1033]

It is the endeavour of all courts, to bring the decision of causes to that which is the real justice and merits of the case: what that is in the present instance, cannot bear a moment's dispute: neither can it bear a dispute, what the defendant claimed an allowance of: it would therefore be very harsh, to say she shall be allowed more than in justice she claims or is intitled to. Nor can this be done, but by determining, that a different construction is to be made of the words, *the said money due and payable*, in the plaintiff's replication, than in her plea; which I have before shewn to be contrary to the rules of construction, and I am sure is contrary to the justice of the case.

Suppose the plaintiffs had replied, that the obligees were willing to take sums mentioned in the plea, and that the bonds were kept on foot by fraud: I should much doubt, whether that would be good. Because the defendant would have said, you mistake my plea, I only insist to cover 8000 *l.* by these bonds, and you say 8000 *l.* only ought to be covered, in which we agree. Our construction does the defendant no injury. The contrary introduces a manifest injustice; and as the law is already hard enough upon creditors, there is no reason to introduce a new hardship.

[1034]

Whatever the case may be as to *Wilson's* and *Campbell's* bonds, which appear to have been forfeited in the life of *Humphry Morice*; yet it is apprehended, that as *Sir William Morice's* bond was not a forfeited one, the case upon that bond might be distinguished from the other two, if it was necessary to run any such distinction, as I hope it is not.

Lord *Hardwicke* delivered the resolution of the court.

There are three points considerable in this case. 1. Whether upon these pleadings the penalties, or the lesser sums, ought to be considered as the debt due to *Wilson* and *Campbell*. 2. Whether there is any legal difference between those bonds, and that to *Sir William Morice*. And 3. What judgment the court can give upon this verdict, considering the opinion they are of.

As to the first, there is nothing more certain, than that when the day is past, the penalty is the debt, and the remedy was in equity. It is admitted, the defendant might have pleaded the obligation only; but it is contended, that here she has claimed only the lesser sums. And my brothers *Page* and *Probyn* and myself (my brother *Lee* declining for particular reasons to give any opinion) think, that the penalties on these two bonds ought to be considered as the debt at law.

The ancient way of pleading was only to set out the bond, and so are the old entries; I cannot find when this was departed from, but believe it was, when the Judges found what inconvenience it was to plaintiffs in not setting out the whole, as appears by the cases of *Page v. Denton*, *Parker v. Atfield*, from which it was argued for the plaintiffs, that when the condition shews what is due, why should more assets be covered, or how are suits in equity avoided? This weighed greatly with me a long time. But upon great deliberation I am of opinion, that those *obiter* sayings are not sufficient, and that this way of pleading may still have great use.

2 Vent. 354.
Salk. 311.

The

The plaintiff cannot have *oyer*, because the defendant is not supposed to have the bond, and therefore makes no *proferit* of it: he cannot tell whether it be a bond for payment of money, or performance of covenants, and must therefore be forced to bring a bill in equity for discovery to reply by. All this is avoided by the special way of pleading; and therefore satisfies the expression, That it will save many a suit in equity. The penalty is a security for costs, and on the act for amendment of the law some costs must be incurred, before a motion to pay can be received; and this is a loss he may sustain by taking it short upon his plea, without putting the plaintiff to shew some fraud; and it may be dangerous for us to blend the rules of law and equity together.

The case of *Page v. Denton* at first sight seemed strong for the plaintiffs. But considering it as a bond to the executor, who would retain, and not a bond to a stranger; it could not be replied to as fraud, for it was payment in his hands, and the same as if a stranger had been paid the lesser sum and interest.

[1035]

The case of *Thompson v. Hunt* in 3 *Lev.* 368. (and which is mentioned as law in *Lutw.* 450.) is strong for the defendant. For though there the penalties only were pleaded, and the conditions appear in the replication, whereas here it is all in the plea, yet that makes no real difference, for when in the rejoinder the defendant took issue on the penalties, he admitted the replication, and so made it part of his plea.

It was insisted here, that the defendant by the manner of her pleading seems only to claim a protection for the lesser sums, and the conclusion of her plea relates to that. This at first seemed to have weight, but upon a nice inspection, there appears a variation in the expression, one being *due and unpaid*, and the other *due and payable*. But there is a more substantial answer, for as to the articles the penal sums of them are averred due, and therefore the general words cannot sometimes refer to the penalties, and at other times to the lesser sums. And though it was objected, that there is no precedent of a replication *per fraudem*, where the condition is set out; it may be answered, that there never was a precedent of a plea worded as this is.

As to the practice at *nisi prius* on *plene administravit*; it may be the executor desires no more allowance, to avoid a suit in equity. And on the trial in *C. B.* on the *scire facias* there, it appeared the lesser sums had been received, and the bonds delivered up.

Whatever

Whatever therefore my first thoughts were, and how much soever the law of executors wants alteration; we think, that as to the two bonds which were forfeited, the defendant must have an allowance for the penalties: and we must *stare decisa*.

[1036]

2. The next thing to be considered is, whether the bond to Sir William Morice differs from the others. And we are all of opinion it does, inasmuch as there the former instalments were paid, and the other two the time was not come for: and it is no more than a bond for payment of money at a time to come, which is certainly pleadable. 1 Roll. Abr. 925. Cro. Car. 363. But then it shall cover no more than is due; for the force of the bond is suspended, till the condition is broken, which appears by the manner of pleading it, Cro. Eliz. 315. where the claim is only for the 20*l.* in the condition. 3 Lev. 57. Here it is in her power to save the penalty, and assets so to do are admitted by pleading: it will be a *devastavit* in her to suffer the assets to be further charged. 1 Vent. 198. 2 Lev. 139. Another reason to distinguish this is, that *per fraudem* could not be replied; for it is no fraud not to pay before due.

3. The last thing is, what judgment can be given upon this opinion. And this is matter of great difficulty, for the assets are found in one intire sum; and the question is, whether we can sever them, or must not award a *venire de novo*. And we desire to have this spoke to.

At another day therefore *Strange* argued, that the court being of opinion, that the penalties of two of the bonds ought to be allowed, but not the penalty of the third; the plaintiffs might have the benefit of this opinion, by adjusting the account of assets, and making the defendant a proper allowance, without awarding a *venire de novo*.

Two things are to be considered: 1. What allowance she is intitled to: 2. How it can be made her on this record.

As to the first the account stands thus: *Wilson's* penalty is 5000*l.* of which she has been allowed for the lesser sum and interest 2,520*l.* so there remains to be allowed 2,480*l.* *Campbell's* penalty is 3000*l.* Already allowed 1,540*l.* remains to be allowed 1,460*l.* On Sir William Morice's bond allowing interest for each of the two instalments unpaid, even to the time of payment, it will be 370*l.* which added to the 2,480*l.* and 1,460*l.* makes in all 4,310*l.* which 4,310*l.* being deducted out of the assets found, being 18,969*l.* 12*s.* 5*d.* there will remain in her hands liable to make us satisfaction 14,699*l.* 12*s.* 5*d.*

The

The second question is, how this allowance can be made her on this record. As to the 4000*l.* part of the penalties, they appear upon the record; and as to the interest computed, the times appear, and the court must take notice what is legal interest, it being settled by act of Parliament. What then should hinder the court from making these deductions, which upon the evidence laid before them it appears she is intitled to?

My Lord *Hobart* 54. says, However a verdict seems to stray, and conclude informally, or not punctually upon the issue, so as you cannot find the words of the issue in the verdict, yet if a verdict may be concluded out of it to the point in issue, the court shall work it into form, and make it serve. So 1 *Sid.* 27. *Carter* 80. a special verdict, which is the words of *lay gents*, is not expected to be so exact as pleadings, and therefore the court will make a reasonable intendment. Here the court can conclude exactly what the *quantum* of assets is, which the defendant is to be charged with, and can precisely determine it. In the common case of a verdict for more than the plaintiff declares for, the court takes notice of that, and takes care to adjust the difference. So is *Tbo. Ent.* 458. 2 *Book of Judg.* 151. 187. 165.

[1037]

In the present case the entry may be, *quia videtur curie*, that the penal sums in two of the bonds, and interest for the remainder of the other, ought to be allowed the defendant, and that therefore the jury have charged the defendant with 4,310*l.* too much assets; *ideo* that 4,310*l.* *ex assensu querentium*, being deducted out of the assets found, let the plaintiffs have judgment to recover the rest.

There is no difficulty upon the special conclusion of the verdict, whereby the jury have left it to the court, only on the point whether the three penalties ought or ought not to be allowed, and have not in their finding provided for the middle case, which has now happened; for this must be considered as leaving the whole matter at large to the court, who must conclude as the jury ought to have done, on a general verdict.

Suppose on the trial the Judge had given the present opinion, must not the jury have found 14,659*l.* 12*s.* 5*d.* assets? Instead of this they have stated the facts on record, and left the court to make the conclusion.

The case of *Hays*, *Hil.* 1 *Geo.* 2. *ante* 844. is in point. He was indicted, 1. for forging a bond, 2. for publishing *such* bond so by him forged, and 3. for publishing a forged bond, knowing it to be forged: he pleaded Not guilty to all three. And a special

[1038]

cial verdict was given, that he forged a bond in the words and figures following, and that he published the same; but they say nothing of the third offence; and conclude, that if upon this evidence the court is of opinion he is guilty of the facts charged in the indictment, then they find him Guilty; and if the court think him Not guilty, they find accordingly. Upon argument the court was of opinion against the defendant, but held they could not give a general judgment, that he was guilty of all the three offences, the evidence only warranting the two first; and as the last was not confined to the same bond, or if it was, yet every publication being a distinct offence, there was no fact found to warrant a conviction for the last. But then they said, they were not tied up by the special conclusion, but that the whole evidence being laid before them, they were to do what the jury ought to have done; and therefore they adjudged that upon the matter referred to them by the jury, it appeared to the court, that the defendant was guilty of the forgery and first publication, and not guilty of the rest. This being a criminal case, and in point, puts an end to all difficulties about the special conclusion.

Et per Chief Justice, I am glad this has been argued, being thereby confirmed in the method I proposed to put it into: and *Hay's* case is in point, where the court made the jury give two verdicts, one for the King and the other for the defendant. And we can adjust the allowance to be made, without introducing or supposing any new fact. The cases of severing damages which are intire, are stronger than the division of assets. In *Townsh.* 2 *Jud.* 117. 151. 189. the entries are as that in *Thompson*, and they warrant our giving judgment in the manner that is prayed on the behalf of the plaintiffs. And judgment was entered accordingly (1).

(1) See the entry of the judgment at large. *Cas. temp. Hard.* 230.

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Easter Term

9 Georgii 2 Regis. In B. R.

Philip Lord Hardwicke, *Chief Justice.*

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

William Lee, *Esq;*

John Willes, *Esq;* *Attorney General.*

Dudley Ryder, *Esq;* *Solicitor General.*

} *Justices.*

Dominus Rex verf. Carpenter.

A Rule was made for the defendant to shew cause against an information in nature of a *quo warranto*, to shew by what warrant he claimed to vote in the election of mayor of *Exon*; on pretence that the right was restrained to resident freemen, which the defendant was not. And on shewing cause, it appearing clearly, that both by the charter and usage the defendant was intitled to vote; the court discharged the rule with costs. *Quod nota* as to costs (1).

Costs given on
discharging a
quo warranto.

(1) *Rex v. Lewis*, 2 Burr. 780. *Say. Law of Cost S. C. S. P.*

Hall verf. Howes.

THE defendant was surrendered by his bail after judgment, and lay two terms without being charged in execution: after this he superseded himself. And then the plaintiff brought debt upon the judgment. And the court held, that common bail only should be required, it being the plaintiff's own laches,

No special bail in
debt on judgment
after defendant
has been super-
seded.
Caf. temp. Hard.
244. S. C.
More full cit.
And. 14.

not

not to detain him when he might: and it was said to have been so ruled *Hil. 8 Geo. 2. in B. R. Clever v. Jordan*, and to be the constant practice in *C. B.* (1).

(1) *Taylor v. Wastneys*, post. *Robinson*, ante 782. *De La Cour* 1218. *Crutchfield v. Seyward*, 2 *v. Read*, 2 *H. Black.* 278. *Wilf.* 93. See *vide Chambers v.*

[1040]

Rogers *vers.* Birkmire.

Where two parcels of land are distinctly let, there cannot be a joint distress for both rents. *Caf. temp. Hard.* 245. *S. C.* more full.

IN trespass for taking goods, the defendant justifies, that he demised (1) some tenements to the plaintiff for one term, and others for another term; and there being rent arrear on both demises, he distrained the goods. And on demurrer it was held ill, for these being separate demises, there ought to have been separate distresses on the several premises subject to the distinct rents: and no distress on one part can be good for both rents. The plaintiff had judgment.

(1) Both demises were contained in the same lease. *Vide* the report *Caf. temp. Hard.*

The King *vers.* The Inhabitants of Preston on the Hill in
Cheshire.

No bill of exceptions lies on summary proceedings about settlements. *Burr. Sett. Ca.* 77. *Seff. Ca.* Ed. 1750. 2 vol. p. 254. No. 172. and *Caf. temp. Hard.* 249. *S. C.*

UPON appeal to the sessions from an order of two justices, the sessions affirmed the order, refusing to state the case specially. Whereupon the parish to which the *pauper* was sent tendered a bill of exceptions, wherein the fact was stated, that the *pauper* had executed the office of parish clerk in the parish from whence he was removed, notwithstanding which the sessions had determined it no settlement, it not appearing how he came to be nominated to the office: and this bill of exceptions was sealed by two justices, and returned up with the orders.

And upon the merits the court was clear, that the justices had erred, the executing the office being indisputably a settlement. But the great doubt was, whether they could take the merits into consideration; it being objected, that a bill of exceptions would not lie in this case of a summary proceeding on a new jurisdiction given by act of Parliament, where the proceedings were always in *English*, and the words of the statute being *aliquot implacitatus*, which mean a proceeding by the course of the common law in a civil suit. And *Salk.* 284. 263. *Carth.* 394. 1 *Lew.*

68. 1 Sid. 84. 5 Co. 104. Cro. El. 751. Co. Litt. 72. a. were cited.

On the other hand it was insisted, that the word *justiciarii* would take in the sessions. 4 Inst. 427. Ryley's Placita Parl. 659. That in the case of *Liverpoole* it was determined to lie on proceedings in the petty bag. That it was never determined not to lie in criminal cases, except in Sir *H. Vane's* case; where the only reason given is, that it would take up too much time at an assizes. And in *Lamb. lib. 4. c. 13.* it is mentioned, that justices of the peace may seal a bill of exceptions upon an indictment.

Sed per curiam, Though it has been often wished that such a bill would lie in cases of settlements, where justices often take too great liberties; yet the inconveniences will be such as out-weigh any benefit that might arise in a particular instance. It will multiply expence, and make summary jurisdictions useless. Lord Coke considers it only as lying in actions, but is silent as to summary or criminal proceedings. And though *Lambert* is as cited, yet it is only what he delivers as from *Marrow*, and has never been followed by any judicial opinion. It was the intent of these acts, that what the justices do shall be final as to fact, and every thing but the law appearing upon the face of the order. It is also a strong reason, that error will not lie, for it is only where the cause comes by writ of error or return, that a bill of exceptions can be debated. In a trial at bar it is never argued, but in the superior court on error. We give no opinion as to criminal cases, in which Lord *Raymond* doubted *Hil. 2 Geo. 2. Rex v. Bunch*, which was the case of a libel, and the Attorney General put an end to the question by withdrawing a juror. The never attempting such a bill, when we all know there have been many occasions for it, is a strong argument against it (1).

[1041]

Et per curiam, Let the rule for confirming the order be taken specially, the court being of opinion, that no bill of exceptions lay.

(1) *Rex v. Owlton*, Burr. S. C. 64. S. P.

Dominus Rex *vers.* Wright et ux'.

On indictments the defendants may be admitted *in forma pauperis*. Caf. temp. Hard. 211. 253. S. C. Much fuller and several precedents cited 3 Bac. Abr. 812. S. C.

THE defendants were indicted for a conspiracy, and the question was, whether they could be admitted to defend *in forma pauperis*. And upon consideration and search of precedents, the court was of opinion they might: for though it is not within the statute 11 Hen. 7. c. 12. which relates to civil suits only; yet it might be reasonable to do it on indictments at common law, where the prosecutor, who can have no costs, is not prejudiced. And the instances vouched shew it to be the course of this court. In the Exchequer indeed there was a provision by 2 Geo. 2. c. 28. for defendants in custom-house causes, but that might be thought necessary, there being no such practice there. A rule was made on the usual affidavit, for the defendants being admitted *in forma pauperis* (1).

(1) *Anon.* 6 Mod. 88. *Rex v. Vide Rex v. Pearson*, 2 Burr. Reynolds, 1 Black. 230. S. P. 1040. 16 Vin. Abr. 259.

[1042]

Dominus Rex *vers.* Morgan.

The statute for costs on informations extends to cases of *quo warranto*.

ON an information in nature of a *quo warranto* for the office of burghers of *Cardiff*, a recognizance was taken as upon the statute 4 & 5 W. & M. c. 18. and not being tried within the year, the court was moved for costs against the prosecutor; which was opposed, on pretence that these informations were not within the act, which speaks only of trespasses, batteries, and other misdemeanors. *Sed per curiam*, A usurpation is a misdemeanor, and the practice of taking recognizances is the best expositor. Besides, this has been determined in *Salk.* 376. But as here has been no verdict or judgment, it must not be costs generally, as on 9 Ann. c. 20. but restrained to 20l. as on the 4 & 5 W. & M. (1)

(1) *Rex v. Howell*, Caf. temp. Hard. 247. S. P. *Vide also Rex v. Filewood*, 2 Term Rep. 145. that the court in granting an information upon this statute will not require the prosecutor to give security for the costs above 20l. in the event of the defendants being acquitted. *Rex v. R. Brook*, 2 Term Rep. 197. See also *Rex v. Powell*, ante 33. In

the note to that case I have made a *quære*, whether the prosecutor should be there liable to costs beyond the extent of his recognizance. But I have since met with an anonymous case, *Seymour*, Rep. 130. which states, that where the relator does not proceed to trial pursuant to notice, it is within the equity of 9 Anne c. 20. that he shall pay costs.

Sir William Halton, Baronet, *vers.* Hassell.

AT *nisi prius* in *Middlesex* in an action brought for a fine of 75*l.* on admission of the defendant to a copyhold. It appeared that the premises were of the value of 50*l.* *per annum*, and a year and half being 75*l.* was assessed: the defendant insisted to pay only 24*l.*: it appearing his rent was but 16*l.* the rest arising from improvements made under an old lease by licence of the lord. And Lord *Hardwicke* was of opinion, that the fine should be set according to the present improved value, which is all the lord has to look after; and if it was otherwise, this might open a door to defeat the lord in a great measure. So there was a verdict for 75*l.* for the plaintiff (1).

Fines to be set according to the improved value.

(1) *Ashle v. Grant*, Doug. 724. (n. 2.) 3 Com. Dig. (H. 4.) 179.

Ambrose *vers.* Clendon. At Guildhall.

IN this case it was ruled, as in *Toms v. Mytton*, Hil. 13 Geo. 1. ante 744. that if the debt of the petitioning creditor appeared to be contracted after the act of bankruptcy, it could be no ground for a commission; but where *A.* had 100*l.* owing on simple contract before an act of bankruptcy, and one is afterwards secretly committed, and then a bond taken; it shall not so far extinguish the simple contract, as to deprive the creditor of petitioning for a commission (1).

Though a bond is taken for a simple contract debt, yet if it is after an act of bankruptcy, the simple contract is not extinguished. Caf. temp. Hard. 267. S. C.

(1) *Vide Blandford & al' v. Foote*, Cowp. 138.

Dominus Rex *vers.* Nunez.

[1043]

ON trial of an indictment for perjury in an answer in *Scaccario*, the case made by the plaintiff was, that she gave the defendant a note for twenty guineas, which he promised not to put in suit against her, but to take it of a debtor of the plaintiff's: notwithstanding which he had sued her, and therefore she prayed an injunction. The defendant denied any such agreement. And on this denial the perjury was assigned, and the plaintiff called as a witness, on the authority of *Paris's* case, 1 Vent. 49. 1 Sid. 431. and *The King v. Moise*, Trin. 10 Geo. 1. ante 595. (1) But the Chief Justice ruled, that she could not be a

Giver of a note no witness on indictment for perjury in denying an agreement not to put it in suit *N. B.* In *Scaccario* the defendant signs his answer, so the proof here to read it was only the hand of the Baron and the defendant.

Caf. temp. Hard. 265. 2 Sess. Ca. p. 377. No. 201. S. C.

(1) *Vide Rex v. J. Morris*, 2 Burr. 1189.

VOL. II.

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witness,

witness, and relied on the case of *Rex v. Whiting*, in *Salk.* 283. He said *Paris's* case was against *Twijden's* opinion, and had not been much liked since (2).

(2) *Rex v. Rhodes*, ante 728. case seems to have been over-ruled. But in *Rex v. Eden*, Hil. v. *Broughton*, post. 1229. *Abraham v. Bunn*, 4 Burr. 2251. this case at N. Pri. 47.

Bush and others, Assignees of Jones, *vers.* Gower.

Usury cannot be pleaded to *sci fa* on a judgment, but it may be brought on by motion to vacate the judgment.

(1) Caf. temp. Hard. 233. much fuller.

TO a *scire facias* on a judgment by confession, the defendant pleaded, that the warrant of attorney was given on an usurious contract. And upon demurrer it was held, that this was not within the statute 12 Ann. st. 2. c. 16. or to be got at this way; for this is no contract or assurance, a judgment being *redditum in invitum*. The court however inclined, that it might be got at on a motion to vacate the judgment, as was done in *C. B. Trin. 3 Geo. 1. Jackson v. Mosley*, where a warrant was obtained from an infant. On the statute *de relogiosis*, who are restrained from obtaining lands *arte vel ingenio*; yet a *præcipe* being brought, and judgment had, there was forced to be the aid of Parliament to inquire into collusion.

(1) *Middleton v. Hill*, Cro. Rowe v. *Bellafey*, 1 Sid. 182. *Eliz.* 588. *Goldsw.* 128. 8. C. *Vide Cooke v. Jones*, Cowp. 727.

Hockley *vers.* Merry.

Where there is an act of bankruptcy between becoming bail on error and the affirmance, the party is not discharged from his recognizance. Caf. temp. Hard. 262. S. C.

THE defendant 9 May 1734, was bail on a writ of error. On 25 October 1734, he committed an act of bankruptcy, and after a commission obtained his certificate. On 12 November 1735, the judgment was affirmed. And in debt upon the recognizance, he pleaded his discharge, and that the cause of action arose before his bankruptcy. And the Chief Justice on the trial held, that the defendant was not discharged, according to the case of *Tully v. Sparks*, Pasch. 3 Geo. 2. ante 867. for this was but a contingent debt, for which the plaintiff could not come in under the commission: the statute 7 Geo. 1. c. 51. only letting in those where the payment was certain, though future. There was a verdict for the plaintiff. (1).

(1) See *ex parte Todd*, 3 Wils. *Mason v. Vere*, 2 Black. 1217. 270. *Waller v. Sherlock*, ib. 272. *Ludford v. Barber*, 1 Term Rep. *Ex parte Groome*, 1 Ask. 119. 86. *Thompson v. Cruikshank*, post. *Ex parte Marshall*, 1 Ask. 129. 1160. and the cases there cited.

Trinity Term

* 9 Georgii 2 Regis. In B. R.

Philip Lord Hardwicke, *Chief Justice.*

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

William Lee, *Esq;*

John Willes, *Esq;* *Attorney General.*

Dudley Ryder, *Esq;* *Solicitor General.*

* This term did not begin till Friday 25th June, 1736, consequently the whole of it fell within the tenth of the King, whose accession was 11 June, 1727. See Burr. Sett. Caf. 27. n. 12 2d edition.

} *Justices.*

Morgan *vers.* Luckup.

IN *aqui tam* on the statute of gaming it was held, that the defendant could not be admitted to plead double, the act for amendment of the law excluding popular actions. And it was said to have been so held *Trin. 13 Geo. 1. inter Webb et Urlin* (1). 1 Barn. B. R. 17.

No pleading double in a *qui tam*. Ann. 262. S. C. 9 Ann. c. 12. 4 Ann. c. 16.

(1) S. P. Law v. Crowther, v. Foster, after time to consider, 2 Wils. 21. in C. B. Lookup v. 4 Term Rep. 701. Frederick, Barnes 365. Heyrick

Dominus Rex *vers.* Badouin.

A Rule was made for the defendant to shew cause why there should not be an information against him. And upon an affidavit of serving the wife at his house, I moved to make it absolute; it was agreed, that personal service was not necessary, and

Practice, Caf. temp. Hard. 271. S. C.

and that this was *prima facie* a good service. But the wife making affidavit, that he was gone beyond sea a week before the service, the court held it not to be good; for leaving at the house is only good upon a supposition the party is there, whereas now the contrary appears.

[1045]

Smith, qui tam, *vers.* Gibson.

Abatement.
Cal. temp. Hard.
271. much
fuller.

ACTION upon the statutes of 13 Ric. 2. c. 5. 15 Ric. 2. c. 3. and 2 Hen. 4. c. 11. for impleading the plaintiff in the admiralty for a matter at land, and arresting the two and thirtieth part of the ship, which two and thirtieth part belonged to the plaintiff, whereby the ship was detained, and he was put to expence.

The defendant pleaded in abatement, that there were other part-owners not joined in the action, who it appeared were injured as well as the plaintiff, since the whole ship was detained in detaining a two and thirtieth part.

Sed per curiam, The *git* of this action is the suit in the admiralty, which was against the plaintiff only, and therefore the rest of the part-owners could not join; and there must be a *respondens ouster*.

Stoughton *vers.* Reynolds.

The right of adjourning a vestry is in the parish at large.
Cal. temp. Hard.
274.
Fort. 168. S. C.

ACTION upon the case for a false return of a *mandamus*, directed to the defendant as archdeacon of Northampton, commanding him to swear the plaintiff into the office of church-warden of *All-Saints* in the town of Northampton, to which writ the defendant had returned that the plaintiff was not elected.

Upon Not guilty pleaded the jury find this special verdict.

That *All-Saints* is an ancient parish and has yearly chosen two church-wardens in *Easter-week*, by the vicar's nominating one and the parishioners the other. That in *Easter-week* 1734, the vicar nominated Benjamin Chapman, and the parishioners nominated the plaintiff, to be church-wardens for the year ensuing, and until others were admitted and sworn, and that both were sworn in, pursuant to such election. That on *Easter-munday* 1735, a vestry was held in the church for a new election; the vicar took the chair, and the old church-wardens were present, and the vicar nominated Chapman to be his church-warden for the

the ensuing year. That the plaintiff and one *Farren* were candidates for the other office and each had the votes of several of the parishioners. That before the election was compleated or all had polled, the vicar at the desire and with the consent of *Chapman* then present, declared the meeting to be adjourned, and did then in fact adjourn the same to the next morning at nine, which adjournment was opposed on behalf of the plaintiff by some of the parishioners. That on declaring the adjournment, the vicar and *Chapman* departed; but the plaintiff and his friends staid, and in fact continued the poll, whereby the plaintiff had on that day the majority of votes. That the next morning the vicar, *Chapman*, and the parishioners in their interest, met; and in fact continued the poll, upon the close of which *Farren* had the majority of votes. That the plaintiff sued his *mandamus*, to which *non fuit electus* was returned by the defendant, and also that *Farren* was elected, and had been sworn in. *Sed utrum, &c. Et si pro quer' pro quer'* and 12*d.* damages. *Et si pro def' pro def'.*

[1046]

Sir *Thomas Abney pro quer'*. The principal question is, in whom the right of adjourning vestries resides. If in the parson alone, or in him and one church-warden, it is with the defendant: if in the whole parish, or in both church-wardens, it is with the plaintiff; for then there was no adjournment, and the poll was regularly continued that day, and at the close the plaintiff had the majority.

By the 89th canon church-wardens are to be chosen by the parson and parishioners jointly, if it may be; if not, the parson names one, and the parishioners are to chuse another. According to this the parson has nothing to do in the election of the parishioners' church-warden. But however this canon cannot controul a custom. *Cro. Jac.* 532. 2 *Roll. Abr.* 287. *Cro. Car.* 551. *Hardr.* 378. *Carth.* 118. This will be in effect vesting the whole in the parson, who never summons the vestries, that being the office of the church-wardens.

Beale contra. I agree, if the right of adjourning is in both church-wardens, or the parish at large, our election of *Farren* must fall.

The jury have found, that the vicar was in the chair, *i. e.* that he presided in the assembly; from whence it may be naturally inferred, he had the right to adjourn. As no case has yet fixed it, consider it on the reason of the thing. Would you take a poll for adjourning? It would be easier to go on with the original poll. In popular assemblies there is a necessity that the

presiding person should have this power. Besides, it is found that the plaintiff was church-warden the year before, and was to continue till another was sworn: what occasion therefore was there to re-swear him, supposing him duly elected and *Farren* not? and what damage is there that can support this action? *Hob.* 267.

[1047] Sir *T. Abney* replied, Though the adjournment is pronounced by the person in the chair, yet it is the act of the whole assembly. 1 *Mod.* 194, 236. 2 *Mod.* 222. The custom is to chuse annually, and therefore he must be annually sworn: and as the jury have found damages, it is now too late to make any objection.

C. J. The conclusion of the verdict is general, whether the defendant has made a false return, which depends on the validity of the adjournment. This is a question of great consequence as to the rights of all the parish and their rates, and I have heard nothing to satisfy me that this was a regular adjournment.

The power must arise from the custom, or common law. Here is no custom found, and I know of no book that shews how it stands at common law. As to the vicar, he seems to have no share in the election of the second church-warden, nor to have any right to preside. Is the right of adjourning in the church-wardens? There is no case for that; though if there was, this is found to be the act of one only. We must therefore resort to the common right, which is in the whole assembly, where all are upon an equal foot. And though there may be a difficulty in polling for an adjournment, yet as there is no other way, that must be taken. It would be giving the vicar too much influence, to fix it in him and his churchwarden.

As to the objection that the plaintiff needed not a re-swearing: it is otherwise, and in corporations when mayors are re-chosen, they are always sworn again, though there is a power to hold over.

Cateri accord? And the plaintiff had judgment upon the first argument.

Between the Parishes of *Heptonstall* and *Evingdon* in *Yorkshire*.

Where children are sent as actually settled, their ages need not be set out.

Durr Sett. Cas.

A Man and four children were sent to *Heptonstall* as the place of their settlement. And I excepted, that the ages of the children were not set out. *Sed per curiam*, That is only necess-

88. S. C. more full,

fary where they are sent consequentially to the father's settlement, but here is an express adjudication of their actual settlement. order confirmed (1).

(1) *Rex v. Bramsbarrow Burr.* 162. *Rex v. Bowling, ib.* 177.
S. C. 98. *Rex v. Uffculm, ib.* S. P.
138. *Rex v. Higher Walton, ib.*

Dominus Rex vers. Luckup.

[1048]

THE defendant was convicted on an information upon the gaming act, which says that he shall forfeit five times the value, to be recovered by a common informer, upon conviction. And it was moved, that a fine should be set upon the defendant, if he refused to speak with the prosecutor. *Sed per curiam*, All the judgment we can give is, *quod convictus est*: and a new action must be brought upon that judgment for the forfeiture, which was thought sufficient to deter the offenders. In the case of recusancy there is no other judgment. *Lutw.* 159, 162. 5 *Mod.* 431. *Cro. Car.* 504. *Co. Ent.* 362. The defendant was discharged without any fine or costs.

The penalty on the gaming act must be sued for after a conviction.
9 *Ann. c.* 14.
4 *Com. Dig.*
Justices of Peace
(B. 42.) 558.

Smith qui tam vers. Dunce.

AFTER a verdict against the defendant for suing in the admiralty for a matter at land, in which case double damages are given; it was moved on 2 *Danv.* 221. that the costs *de incremento* should not be doubled. But on citing *Carth.* 321. 10 *Co.* 116. and producing the record of the case of *Child v. Sands* mentioned in *Carthew*, where the doubling the costs *de incremento* was assigned for error, and over-ruled; the court was of opinion, that there was no distinction between the costs given by the jury, and those given by the court, but both ought to be doubled.

Costs de incremento are to be doubled as well as those given by the jury.
Hullock on Costs. 475.

Dominus Rex vers. Davis.

THE statute 10 *Ann. c.* 23. requires the sheriff to deliver to the clerk of the peace all the poll books taken at the election of knights of the shire. In the *Radnorshire* election the sheriff swore a clerk, and each of the candidates had two others, and five polls were taken, which were delivered to the sheriff. He carried in that only which was taken by his clerk, as being the original poll, and the others only checks: and insisted, that the act in requiring all the poll books to be lodged, meant

The check polls as well as the original book must be lodged with the clerk of the peace.

only in the case where the poll is going on at different booths, and all the books make but one poll. But the court held, that all the books ought to have been carried in; and granted an information against the sheriff for not doing it.

N. B. Upon a reference to Mr. Attorney and me, we reported for a *nolle prosequi*, it not being a wilful, if any mistake.

[1049]

Dominus Rex *vers.* Morgan,

Certiorari to Old Bailey for a defendant.

Ante 549, and the note 583, 711.
Post. 1068.

A *Certiorari* was granted, to remove an indictment of perjury from the *Old Bailey*, on the part of the defendant, upon an affidavit that he had twice paid costs for not going on to trial, the Judges being gone away; which the court allowed to be a special reason, that distinguished this from the common case, where *certiorari*'s are denied.

Wigley *vers.* Morgan un', &c.

Where an attorney is defendant he may change the venue into *Middlesex* (1).
Caf. Temp.
Hardw. S. C. 285.
Andr. 384.

THE question was, whether an action *against* an attorney, he had privilege to change the venue into *Middlesex*, as well as to lay it there when he is plaintiff. And the court held there was no difference. *Vide Salk. 668. 2 Show. 176. 2 Lill. Pract. Regist. 370. 1 Keb. 277. Mich. 11 Geo. 1. Townsend v. Duppa, (ante 610). 2 Vent. 47.* The venue was changed into *Middlesex* in this case.

(1) *Vide Pope et ux. v. Redfearne, 4 Burr. 2027.* Where this case was over-ruled, and it was settled that an attorney defendant has no such privilege, see also the cases collected by Sir James Burrows, in a note there, and *Yearly v. Rowe, 3 Term Rep. 573. R. acc.*

Holdfast *vers.* Freeman et al'.

Practice.

THE notice in ejectment was to appear on the effoin day of this term, And held ill, for it should be to appear the first day in full term, which is the appearance day.

Williams *vers.* Jones.

A battery cannot be justified by an arrest only.
Caf. Temp.
Hardw. 298.
S. C. more full.

IN trespass, assault, and battery; the defendant justified an arrest under process. And on demurrer it was objected, that though process will justify the assault in arresting, yet to justify a battery, resistance or an attempt to rescue himself should be shewn;

shewn; and *Lutw.* 929. was cited, and precedents, where the plea is Not guilty to the battery, and a justification as to the assault, *Co. Ent.* 303. b. *Tho.* 306. 1 *Brown.* 237, 238. 2 *Brown.* 134, 145, 146. *Hearne* 489. 2 *E.* 4. 6. b. 2 *Roll. Abr.* 546.

And after time taken to advise, the Chief Justice delivered the opinion of the court, that the plea was ill; and the plaintiff had judgment (1).

(1) *Vide Truscott v. Carpenter*, 1 *Ld. Raym.* 229. *Bull. L. N.* p. 19.

Dominus Rex vers. Jenkins.

[1050]

TWO justices made an order, reciting that the defendant had been charged with being the father of a bastard child, and that upon examination into the matter they were of opinion he was not so, and do therefore adjudge that he be acquitted thereof.

Two justices cannot acquit a man charged with a bastard, *Cal. Temp. Hardw.* 38. 2 *Sess. Ca. p.* 229. no. 161. *Foley*, 421. *S. C.*

And the court upon consideration were all of opinion, that the justices had gone too far; for their whole authority is under 18 *El. c.* 3. whereby they are only impowered to take order for the relief of the parish, and punishment of the offender; but have no power to acquit the party, or convict him finally: which appears likewise from their proceedings being in *English*, where they are not required to set out the evidence, or shew a summons. The sessions indeed on 3 *Car. I. c.* 4. § 15. may make a final order; and after a man is discharged by one sessions, a subsequent sessions cannot take it up again, as was held *Mich. 13 Geo. 1. Rex v. Tenant*. And it would be greatly inconvenient, the justices should have such a power; because the parish cannot appeal: the defendant indeed may, not by virtue of express words, but in consequence of the clause about giving security to abide the order of sessions, if the party does not submit to the order of two justices. And though a man may hereby be liable to be harrassed in being carried before several justices, that is a less evil than the other: and besides, this court is open, if any thing should be done to the manifest oppression of the party. The order was quashed.

Ante 716.

Dominus Rex *vers.* Davis and Gosling.

Of the power of
the sessions as to
constables.
Cas. Temp.
Hardw. 269.
S. C. more full.
(1).

THE sessions of *Monmouthshire* made an order, reciting that *Ablard* and *Evans* had complained, that they had served as constables of *Chepstow* a year, and that though four persons were returned by the homage to the steward, he had appointed no new ones; and therefore they prayed to be discharged, whereupon it is ordered that the defendants be appointed in their stead.

And upon considering the statute 13 & 14 Car. 2. c. 12, which only impowers the sessions to appoint constables, until the Lord shall hold a court; this order was quashed, because it was in the disjunctive, for a year, or until others were chosen. Besides, there was no adjudication that the others had served a year.

(1) It appears from this report that there were two other exceptions, 1. That it was not said that the persons thus appointed were inhabitants of *Chepstow*, 2. That no particular Justice is appointed for them to take the oath of office before. *All. 78. 5 Mod. 131.* But the court gave no opinion upon these objections but quashed the order for being in the disjunctive: *Hawk. P. C. c. 10. f. 49. p. 103.*

[1051]

Cooper *vers.* Le Blanc. At Guildhall.

Where a man
has owned his
hand to an in-
dorsement he
shall not set up
a defence of for-
gery by simili-
tude.

Ann. 295. S. C.

THE defendant was sued as indorser of a note. And it was proved, that a discounteer sent the note to the defendant, who looked on it, and said it was his hand, and the note (which had some months to run) would be paid when due. The Chief Justice refused to let the defendant in to shew forgery by similitude of hands (1), since it would tend to destroy all negotiation of notes and bills. But he seemed inclined to allow proof of actual forgery, if the defendant could have shewn it (2), which he could not. And the plaintiff obtained a verdict.

(1) *Bull. L. N. P. 236.*

(2) *Jennings v. Fowler, ante* 946. and the authorities cited in the note are *contra* to this *dictum*.

Barker vers. Sir Wolston Dixie.

IN case for a malicious prosecution of an indictment for felony, the jury found for the plaintiff, and gave 5 s. damages. And upon motion for a new trial on account of the smallness of damages, the court held there could be no new trial on that account: for this was not a false verdict, as finding for the defendant would be, and would subject them to an attain; whereas they having found rightly for the plaintiff, no attain would lie. And new trials came in the room only of attainments, as a more expeditious and easy remedy.

No new trial for smallness of damages.

Andr. 251. n.

a. S. C.

Salk. 647.

Ante 425, 940.

Kynaston vers. the Mayor, Aldermen and Assistants of Shrewsbury.

TO a *mandamus* to restore the plaintiff to the office of alderman it was returned, that at an assembly held such a day the plaintiff was for being absent three years removed. And upon a traverse of every part of the return, a special verdict was found as to some points which are not necessary to be stated, in as much as no opinion was given upon any but one, which was this. The removal was not upon a charter day, so a summons of an assembly was necessary: the mayor gave orders for a summons of all the members, but the serjeant being informed and believing that one of the aldermen was out of summons, neglected to give him notice, though he had a house and family in the town, and accordingly returned him out of summons. And upon this part of the case the court was of opinion, it was not a regular assembly, for every member should be summoned; and he has a right to debate as well as vote. And this point has been so often settled, that it is not now to be made a question. And by the same reason that the omitting to summons one man may be excused, the omission of a greater number may be passed over.

If one member be omitted to be summoned to a corporate assembly, the act is void (1).

4 Bro. Par. Ca. 271.

Viner vol. 14.

p. 583. c. 4.

Caf. Temp.

Hardw. 147.

2 Barn. B. R.

394. S. C.

Andr. 171, 360.

S. C. S. P. 1b.

85, 104. But

not S. P.

S. C.

7. *Pro Part.*

396.

[1052]

Whereupon a rule was pronounced for a peremptory *mandamus*. And the plaintiff prepared to enter up a judgment for his damages and costs, when it was found, that at the trial there was an omission of damages, and consequently there could be no judgment for costs.

(1) *Vide Sir Christopher Musgrave v. Newinson, ante 584.*

Where on trying a traverse to a return no damages are given, this cannot be supplied by writ of inquiry.

Ante 1031.

And if no damages are given no judgment can be entered.

Neither can a waiver of them by the plaintiff set it right.

3 Com. Dig. Damages.

(L. 1.) 344.

(L. 2.) 350.

If no damages are assessed upon such a traverse the defendants would be subject to an action for a false return.

To supply this defect the court was moved for a writ of inquiry. And *Cro. Car.* 143. and the cases of *quare impedit* and dower were cited, where damages not being the *git* of the action, the want of them may be supplied by writ of inquiry.

To this it was answered, and resolved by the court, that the rule laid down in *Cheyney's* case, 10 *Co.* is right, that where the jury are charged with a matter for which an attaint will lie if they give a false verdict, it can never be supplied by writ of inquiry, but must be by *venire facias de novo*, and so is *Salk.* 205. 5 *Mod.* 118.

By the statute 9 *Ann. c.* 20. this traverse is given in the room of an action for a false return: and as there it cannot be said the damages are collateral, so neither can it here; for they are consequent upon the issue, and as much within the charge of the jury. No one can doubt, but that if in an action for a false return damages had not been given, they could not be supplied by a writ of inquiry. All the cases of replevins upon the statute 17 *Car. 2. c.* 7. are in point as to that. 1 *Sid.* 380. *Raym.* 170. 1 *Vant.* 40. 2 *Keb.* 408. *Tucker v. Stevens* in *C. B. Trin.* 6 *Geo.* 1. Here it ought to be by the same jury, and there is no difference between a special and a general verdict. The plaintiff's counsel will therefore consider what to do, or pray.

And a writ of error being then depending in Parliament, it was not thought advisable to pray a *venire facias de novo*, but to consider of some form of a judgment to be entered up, in order to carry to the Lords. And the judgment that was entered was, "It is considered by the court, that the return is not sufficient in law to bar or preclude the said *Corbet Kynaston* from being restored to the said place or office of one of the aldermen of the said town, and that the said return for the reasons aforesaid be disallowed and quashed."

And thereupon the cause was argued at the bar of the House of Lords, where no opinion was given upon the points of the special verdict, but a judgment pronounced for remitting the record to *B. R.* who were directed to award a *venire facias de novo*. There were three Judges present, *C. J. Willes*, *J. Denton*, and *B. Thompson*, to whom two questions were put.

1. Whether there being no damages, any judgment could be entered. To which they answered that there could not; and declared that no waiver or *remittit* of damages below could have set this right, for then there would be nothing to give judgment for, the entry being only a judgment for damages and costs, and

and the peremptory *mandamus* goes by rule for him for whom judgment is given, which are the words of the statute.

The second question put to the Judges was, whether as no damages are given, the plaintiffs in error would not be subject to an action, which would be a double vexation. As to this their opinion was, that an action might be brought, the statute only taking it away in case damages are given upon trying the traverse.

The judgment was reversed, and a *venire facias de novo* directed to be awarded by B. R. (2).

(2) *Vide Hafwell v. Chalis*, post. 1124. *Parker v. Wells*, 1 *Cooke's Bank. Law.* 166. 1 *Term Rep.* 783. *Lickbarrow v. Mason*, 5 *Term Rep.* 367. In which cases the House of Lords have directed a *venire de novo* to be awarded by B. R. In *Street v. Hopkinson*, post. 1055. *Caf. Temp. Hard.* 345. S. C. which was a writ of error from the *Common Pleas*, the court of King's Bench were of opinion that they could not award a *venire de novo* for that would be for B. R. to continue and transfer the proceedings into their court. But in *Harwood v. Goodright*, *Cowp.* 91. Lord Mansfield declared, that the court of B. R. have power to award such a *venire* in a writ of error from the *Common Pleas*, and

in *Grant v. Aftle*, *Doug.* 722. they did award it, as also in *Bent v. Baker*, 3 *Term Rep.* 37. See also *Sutton v. Johnston*, 1 *Term Rep.* 528. and the cases collected in note (b). In *Trevor v. Wall*, B. R. refused to award such a writ upon the ground that the proceedings upon which error was brought originated in an inferior court. 1 *Term Rep.* 151. But in *Davis v. Pierce*, 2 *Term Rep.* 125. where a bill of exceptions had been tendered in the court of Great Sessions in *Wales*; and the proceedings were removed by writ of error into B. R. that court being of opinion that the bill was properly tendered, awarded a *venire de novo* into the next *English* county.

Michaelmas Term

10 Georgii 2 Regis. In B. R.

Philip Lord Hardwicke, *Chief Justice.*Sir Francis Page, *Knt.*Sir Edmund Probyn, *Knt.*William Lee, *Esq;*John Willes, *Esq;* *Attorney General.*Dudley Ryder, *Esq;* *Solicitor General.*} *Justices.*Smalt *vers.* Whitmill.

There must be personal service of a witness to warrant an attachment.
Ante 810.
Post. 1150.

AN attachment was moved for against a witness, for not attending, being subpoenaed, and having a shilling left. But it appearing not to be personal service, the court held it not sufficient to warrant a proceeding criminally against him (1); whether it would do in an action, they would not declare. It was also said, that though a shilling is what is constantly given with a *subpoena*, yet if the witness comes far, there ought to be a tender of reasonable charges.

(1) *Wakefield's case, Cas. Temp. Hardw. 313. S. P.*Cock *vers.* Wortham.

Servant a witness in action by the master *per quod, &c.*

IT was held, that in an action brought by a father for deflowering his daughter, *per quod* he lost her service; the daughter might be examined as a witness for the plaintiff (1).
Ante 414, 595, 944.

(1) *Tullidge v. Wade, 3 Wils. 18. S. P.* But she must not give in evidence a promise of marriage. *Id.*

Street *vers.* Hopkinson et al.

A Writ of error was brought, *tam in redditione judicii* against the testator, *quam in adjudicatione executionis* against the executors. As to the principal judgment, the defendant in error pleaded the statute of limitations, and prayed that the judgment be affirmed. As to the award of execution, *in nullo est error* was pleaded. And that appeared to be in a *scire facias* against two executors, one of whom pleaded *ne unusquis executor*, and the other pleaded payment by the testator: and upon this plea there was a verdict against it, but no verdict as to the other, and then follows the award of execution.

Upon pleading the statute of limitations in error, the judgment is to bar the plaintiff of his writ. *Caf. Temp Hardw. 345. 330. S. C. Ante 127, 439, 683.*

As to the principal judgment, the only doubt was, whether as the defendant in error had concluded with a prayer that the judgment be affirmed, the court could give the proper judgment, which was, that the plaintiffs be barred of their writ of error. But the court held, that they were not bound by the prayer of an improper judgment, and therefore pronounced the rule, that the plaintiff in error should be barred.

And as to the award of execution, they were of opinion it was wrong, and that not being in the same court, they could not award a *venire facias de novo* (1): and this being a distinct judgment, might be reversed without affecting the other. And it was reversed accordingly. The cases cited upon the first point were *Show. 50. Carth. 369, 370. Lutw. 1386. 2 Lev. 58. And on the second point, 1 Roll. Abr. 803. 1 Inst. 127. 3 Salk. 372. Cattle v. Andrews, Hil. 5 W. & M. rot. 826. in B. R. Cumb. 259. Salk. 4, 363.*

There can no *venire facias de novo* be awarded on error.

(1) *Ante 1052.* and the cases cited in the note *contra*.

Dodson vers. Taylor.

THE cause was tried by proviso, and the plaintiff nonsuited. But that nonsuit was set aside, for want of a rule being given in the office, the form of which is, *Fiat nisi prius per propositum querens fecerit defaultam*. And this was agreed to be the old practice, but generally discontinued. *Stiles and Lilly's Registers* were cited, and the nonsuit set aside (1).

There must be a rule before any trial by proviso.

(1) *Proude v. Willimote, 1 Barnard. B. R. 18. acc.* But it is sufficient if the defendant obtain this rule any time before the trial. *King v. Pippet, 1 Term Rep. 695.*

Thrustout, on the demise of Turner, *vers.* Grey et al.

Court cannot
stay proceedings
in ejectment,
though lessor's
title is at an
end.
Caf. Temp.
Hardw. 165.
1 at not S. P.
5 Com. Dig.
Pleader.
(3 Z. 4.) 684.

UPON a special verdict in ejectment, it appeared that the lessor of the plaintiff claimed as tenant for life: and upon an affidavit of his death, it was moved that all proceedings might stay, since it could signify nothing to argue it upon the merits. *Sed per curiam*, Though the possession cannot be obtained, yet the plaintiff has a right to proceed for damages and costs: all we can do is, to oblige him to give security for costs, now the lessor is dead; as we do in the case of infant lessors, who cannot enter into the common rule.

Weston *vers.* Pool.

The executrix
of an attorney
pays no costs,
tho' a sixth part
of the bill is
taken off.

AN attorney delivered his bill, and after his death application was made to tax it, and above a sixth part was struck off: it was moved that the executrix might pay the costs: but the court held she should not, for the words of the act 1 Geo. 2. c. 23. § 22. impose them upon the attorney or solicitor only, and the executrix is not to blame, if she stands upon his bill, or makes out one from his books (1).

(1) *Dutton v. Agate*, Say. L. of Costs, 327. S. P.

Middleton et ux' *vers.* Croft.

Of the jurisdic-
tion of the
spiritual court as
to clandestine
marriages.
2 Barn. B. R.
351.
2 Kely. 148.
2 Atk. 650.
Andr. 57.
Cunn. 35, 114.
Ann. 57, 327.
395.
4 Vin. Abr.
320. pl. 14.
S. C.

IN prohibition the plaintiff declares, that by the statute 7 & 8 W. 3. c. 35. a penalty of 10 l. is inflicted on every man who marries without licence or banns, notwithstanding which he and his wife had been cited into the spiritual court, for being married before eight in the morning, without licence or banns, contrary to the canon, which fixes the time to be between eight and twelve, and requires a licence or banns: that they are lay persons, not bound by the canon, and therefore pray a prohibition. The defendant as to the contempt pleads Not guilty, and for a consultation demurs.

And after several arguments at bar, the Chief Justice this term delivered the resolution of the court.

Lord Hardwicke, In this case three questions have been made.
1. Whether by the canons of 1603. lay persons are punishable

for a clandestine marriage. 2. If not: whether by the canon law anciently received the spiritual court has a jurisdiction to proceed for a clandestine marriage. And, 3. Supposing they have a jurisdiction either way, whether that jurisdiction is taken away by the act of Parliament, which has inflicted the penalty of 10*l*.

[1057]

As to the first of these, two things are considerable, 1. Whether the laity are within the words of those canons. 2. Whether there was a proper authority to bind the laity, if the words do extend to them.

And as to the question, whether the words take them in: those which any way relate to this matter are the 62d, 101st, 102d, 103d, and 104th canons: in the four first of which there are no words that affect the parties contracting: indeed in the 104th there are words relating to the married persons; but they relate only to marriages under void or irregular licences, which is not this case: and therefore upon this point we are all of opinion, that lay persons are not within the words of the canons of 1603.

The next point is, whether the makers of those canons had a power to bind the laity. They were made by the bishops and clergy in convocation assembled, by virtue of the King's writ, and confirmed by his charter under the great seal.

The general opinion has been, that these having never been received or confirmed in Parliament, cannot bind the laity. And my brother *Wright* in his argument seemed to admit it, by putting the case upon the foot of the old canon law: but as the other counsel who argued on that side did not give it up, it may be proper to settle it: and we are all of opinion, that *proprio* *jure*, the canons of 1603. do not bind the laity; I say *proprio* *jure*, because some of them are only declaratory of the ancient canon law.

They who look into *Spelman's* collection, will find much matter in the ancient councils, that may serve for illustration and argument; but as those were often mixed assemblies, composed of the nobility, legantine authority, and papal usurpation, little can be found as to the merits of the question, whether the laity are bound or not.

The only proper way therefore is, to consider this question upon the foot of the ancient constitution. No new law can be produced here, but is the work, and has the consent of the estates of the realm: and so it is declared in the *Parliament*
Vol. II.

F f

Roll

[1058]

4 Inst. 322.

Roll 4 Hen. 5. p. 2. n^o. 19. 12 Co. 74. 4 Inst. 1. For they representing the whole realm, every man is by representation a party. In the making of canons, the Royal assent is all the share that the Legislature has in them: for the Lords and Commons are excluded, and not represented. It was said indeed by Dr. *Andrews*, that even in Parliament there was not an actual representation of all orders and degrees of men, there being more subjects who do not vote in the election, than who do. But that does not make it cease to be a representation: it was impossible that all could join in the election, and therefore our constitution has fixed it in the more worthy, who have a right to bind the rest. The learned Doctor indeed advanced a notion, that the parson represents the parish: but how can that be, when we all know the parson is not elected by them? The writ is *convocari facias totum clerum*, and the premonition is, that archdeacons and deans shall come in person, and the rest by their representatives. These shew plainly, that the clergy only are called, and that the proctors are chosen to represent the clergy only. Hence arises the distinction between canons made in ancient councils confirmed by the empire after it became Christian, and those made here. The Emperor, according to *Justinian* and the *Digest*, had a legislative power; and when they received his confirmation, they had their full authority. But that is not the case here: the crown has not the full legislative power, and it is therefore rightly said in *Salk. 673*. The King's consent to a canon *in re ecclesiastica* makes it a law to bind the clergy, but not the laity: and no one can say, that the consent of the people is included in the Royal confirmation.

Another argument is, that by our constitution taxes and new laws are co-extensive: the Parliament lay taxes on all the people; but the clergy never pretended to tax any but themselves. And it seems very absurd, that when they cannot raise money upon the laity, they should still have it in their power to enact new laws, whereby their liberty and property may be affected.

In all the acts since the reformation for confirming forms of prayer, and other ecclesiastical constitutions, the preambles shew that the clergy in convocation were only considered as the propounders of them. It was said, that this did not give being to them as laws, to bind the laity, but was only to enforce them by the addition of civil penalties. But that is not the only reason, though it is one. The true use of these confirmations in Parliament was the extension of them over the laity, who would otherwise not be bound. It has been said, that at least they should bind *in re ecclesiastica*: but this proves a great deal more. There are many things of an ecclesiastical nature which

which no canon can touch, as the case of tithes, the degrees of consanguinity, and the operation of administrations: and if this argument would hold, they might overturn the common law as to the heirship of lands, and the division of personal estates, which would never be endured. These are matters that have always been regulated by the legislature, witness the statutes of [1059] 32 Hen. 8. c. 28. 21 Hen. 8. c. 5. and 22 & 23 Car. 2. c. 10. If they were thought to have power in these matters, how came the bishops, at the time of making the statute of *Merton*, c. 9. to apply for a declaration touching the legitimacy of children born before lawful marriage?

As to the case cited from 1 Roll. Abr. 909. l. 5. that *bona notabilia* were by a canon settled at 5 l. in King James the First's time. In the first place it is a mistake, for there were canons set it at that, long before even Perkins, who § 489. notwithstanding estimates them at 40 s. Rolle himself adds a *dubitatur*. And after all, what is this more than a regulation of fees amongst themselves? 8 Co. 135. a. is a report of the same case, and he says nothing of this; so that at most it is but a loose saying in an abridgment.

In the statute law there is nothing express upon this point; but there are strong implications. The 25 Hen. 8. c. 19. impowers commissioners to inspect the canons: and in *Rastal's* statutes there are several acts subsequent for that purpose. And it is observable, that the statute of 25 Hen. 8. begins with the submission of the clergy *in verbo sacerdotii*; and though nothing is said as to the persons to be bound, yet it appears the clergy thought it proper to take along with them the consent of the laity, to abrogate and alter canons: and every body must see, that if this authority had been executed, the system would have derived its binding force from the grantors.

I come next to consider the judicial authorities. The first is the prior of *Leed's* case, 20 Hen. 6. 12. b. *Brooke Ordinary* 1. where it is expressly laid down, that the ordinary has power to make holidays, fasting days, and constitutions provincial, *de iure le clergy, mes nemy de iure le temporalty*.

The next case *Mich. 24 Ed. 4. 44. b.* where though there is some difference in opinion upon the power of the convocation, yet as to the point now in question it is agreed on both sides. In 5 Co. 32. b. *Cawdrie's* case, my Lord Coke lays it down, that by general consent of the whole realm canons may be made or altered.

In *Mo.* 755. *Plowd.* 43. 2 *Co.* 37. the question proposed is, whether the deprivation of the puritan ministers was lawful; and the Judges said it was, because the King had delegated them full power, as he might.

[1060] That a parliamentary confirmation is necessary, see *Carth.* 485. *Salk.* 134. And I have seen two manuscript reports of that case in *Carthew*, by my Lord *Raymond* and Chief Justice *Eyre* both of which agree with the report.

Ld. Raym. 447.

In *Mod. Caf.* 188. in a suit for not coming to church, *Holt* says, if you have a canon before 1603. it may bind: and in *Davis's* case, *Mich.* 5 *Geo.* 1. *In C. B. King* C. J. laid it down as a prevailing opinion, that the canons of 1603, did not bind the laity.

Having thus considered the cases which warrant our opinion, let us now take notice of the three cases relied on against it.

The first is in *Mo.* 781. a very extraordinary case, and no precedent, for there both were clerks: and though it is laid down pretty strongly, as if a bishop could bind his diocese; yet it is not said, that he could bind the laity therein.

The second case is *Vaughan* 327. and what he says there is certainly right, that a *lawful canon* is the law of the kingdom, as well as an act of Parliament. But does he define what is a lawful canon, or that it will bind the laity without their consent? On the contrary in the very next paragraph he speaks of a canon as warranted by act of Parliament.

And as to the case in 2 *Vent.* 41. where *Vaughan* says, Though no canons are confirmed by Parliament, yet they are the laws which govern in ecclesiastical affairs: I observe that was only a *dictum* upon a motion, and was at the time expressly contradicted by *J. Tyrrell*, who holds that the King and Convocation without the Parliament cannot make any canons, which shall bind the laity.

Upon this state therefore of the authorities on each side of the question, it is easy to see which preponderate; the three last resolve all into the single opinion of C. J. *Vaughan*, to which I oppose all the rest, and lay it down as our confederate opinion, that the canons of 1603. do not *proprio vigore* bind the laity.

The second point I proposed to consider was, whether laying aside the canons of 1603, the spiritual court has any jurisdiction under

under the former canon law received and allowed, to proceed against the plaintiffs for a clandestine marriage. And we are all of opinion, that in this respect their jurisdiction is well founded.

It has been already proved, that the received canons bind the laity; and this appears by our statute law, 25 H. 8. c. 21. in the preamble, and 35 H. 8. c. 16. which continues the force of canons accustomed and used: and here rests the ecclesiastical power. My Lord Hale in a manuscript I have seen of his, says it was first introduced by external power and discipline allowed or tacitly submitted to, which introduced it as a custom: it therefore only remains to inquire, whether the canons against clandestine marriages have been received or not. In the *Decretal*, lib. 4. tit. 3. c. 3. is one, which was adopted here, as appears by *Linwoode*, and it runs *quod hujusmodi contrahentes excommunicentur*.

[1061]

It was said that in the books at *Lambeth* there are innumerable instances of such proceedings; and I believe there are, but as they have passed *sub silentio*, let us rather look out for a judicial decision, and I have one; it is in Sir *W. Jones* 257. where it is held, that if any marry without banns or licence, they are citable for it into the ecclesiastical court, and no prohibition shall go.

This case therefore is in point, and uncontradicted. And indeed is not to be imagined, that so great an evil as clandestine marriages was unpunishable in the parties, till the statute of *W. 3.* inflicted the penalty of 10*l.* upon the husband.

And this brings me to the third and last point I proposed to consider, which is, whether the statute of 7 & 8 *W. 3.* has by inflicting that penalty, taken away the jurisdiction of the spiritual court.

Before I consider this I would make two observations: 1. That though this was for but a short time at first, yet it is continued by subsequent laws, the 8 & 9 *W. 3. c. 19.* and the 5 *Ann. c. 19. § 36.* for ninety-six years. 2. That the penalty is only upon the man, so that as to the woman she indisputably remains subject to the ecclesiastical jurisdiction.

But we are all of opinion, that as to the man too the jurisdiction was not taken away. In 2 *Vent. 41.* it is held, that their jurisdiction was not taken away by the conventicle act. So in 2 *Lev. 222.* Sir *T. Jones* 131. as to teaching school. Inded in

Carth. 464. there was a prohibition, upon the maxim, *quod nemo bis puniri debet pro uno et eodem delicto*. And that to be sure is a strong objection, if the penalty, and the suit in the spiritual court, were *eo nomine*, and the intent the same.

But this is a sort of middle case, where the penalty is not given as the punishment for the offence, but only to secure the payment of the stamp duty. For it is introduced by the words, *and for the better collecting, &c.* It is therefore a proceeding *diverso intuitu*, as upon the statute of *Articuli Cleri*.

[1062]

This is stronger than the cases of fathers and mothers of bastards on 18 *Eliz.* c. 3. where there is a punishment for the act of lewdness, and yet the spiritual court proceeds hand in hand for incontinence.

2 Inst. 488.

Godb. 247.

3 Burr. 1679.

2 Term Rep.

270.

Rex v. Bowen,

5 Term Rep.

Here one jurisdiction punishes for the criminal act itself, and the other for an intended fraud upon the revenue.

The rubrick ordains the publication of banns, and that is confirmed by 1 *Eliz.* c. 2. § 16. and the act of uniformity 13 & 14 *Car.* 2. c. 4. the consequence of which is, that the rubrick binds the laity.

And upon this a new point may arise, whether supposing the statute was a repeal of the ancient jurisdiction; yet it can abrogate it, where it is confirmed by Parliament. Now every body knows, a new penalty is no repeal of a former, without express words of repeal: without these, both may stand, and the last be considered only as a further penalty.

There is nothing of that in this statute, and therefore we may warrantably determine, that the 7 & 8 *W.* 3. has not abrogated the ancient jurisdiction in the case of a clandestine marriage.

I have thus largely gone through the several questions which have arisen in this case, that as we are all sensible, the evil of clandestine marriages is a growing one, it may be clearly understood, upon what foot the remedy stands.

And upon the whole we are of opinion, that there ought to go a consultation as to all the points of the suit below but one, which is the hour at which the marriage is alleged to have been had. Now as the confining marriages to be between eight and twelve in the morning, is only a regulation introduced by the canons of 1603, which we have determined do not bind in this case; it is of consequence, that the spiritual court be restrained from making that any ground of their proceedings; in this respect

spect therefore the prohibition must stand, and a consultation must go for the rest.

After pronouncing this judgment, the plaintiff in the prohibition moved for costs, having prevailed in one point, and the statute of 8 & 9 W. 3. c. 11. § 3. giving costs in all suits upon prohibitions to the plaintiff obtaining judgment, or any award of execution. And it was prayed that they might be taxed from the time of the first motion, according to several determinations: and this last was acquiesced in, if the court should be of opinion for costs; as to which it was said that the hour was not the *git* of the proceedings in the spiritual court, but only a circumstance amongst others to prove it a clandestine marriage: and that it would be very hard, that they who had prevailed upon the merits, should pay costs. *Sed per curiam*, The words of the act are not to be got over, which give costs to the plaintiff, if he obtains any judgment: and this matter was under consideration in the House of Lords in *Dr. Bentley's* case, where the prohibition stood as to some articles, and there went a consultation for the rest: to be sure it will be considered in the *quantum*, but we cannot deny costs.

If the plaintiff in prohibition prevails in any part, he shall have costs (1).
Ante 82.

[1063]
Ante 82.

Ante 913.

However no rule was made for costs, it being objected, that the husband died before judgment, and the 8 & 9 W. 3. c. 11. § 7. not extending to this case, which was a suit by husband and wife, who are but one person, and consequently his death abates the suit. As to which point (being of some nicety) the court ordered it to be spoke to; but I never heard of it afterwards, and believe the parties agreed to waive any further proceedings against the wife in the spiritual court, and she to drop her pretensions to costs:

N. B. Mich.
11 Geo. 2. it was resumed; and the court held, the suit was not abated at common law; or if it was, yet

the statute 8 & 9 Will. 3. c. 11. had helped it: and therefore a rule was made for taxing costs for the plaintiff in prohibition. And. 57.

(1) *Malton v. Acklam*, S. P. in matter in issue, and a consultation C. B. where a verdict was found awarded for the rest. *Barnes*, 138. for the defendant as to part of the

Barnes vers. Peterfon.

AN ejectment was brought for lands in *Norfolk*, and *inter alia* for five acres of *Alder Carr*: and it was moved to be too uncertain; but upon the certificate of *Norfolk* men from the bar, that it is a term well known there, and signifies the same as *alnetum*, which is mentioned by *Lord Coke*, and means land covered with alders; the court held it well enough, alluding to

Ejectment lies for *Alder Carr*.
5 Com. Dig. Pleading, (2 Z. 1. 676. post. 1084

Ante 71.

the case of Lord *Kildare* and *Fisher*, where it was held to lie for mountain in Ireland; and *Lee J.* said, that in *Yorkshire* it is common to bring ejectment for cattle gates.

Blackwood *vers.* the South-sea Company.

It is no objection to proceeding on error that the return is not signed by the Chief Justice. *Caf. temp. Hard. 344. S. C. Yelv. 34. Salk. 192.*

[1064]

Post. 1080.

UPON error from *C. B.* it was objected, that the return was not signed by *C. J. Eyre*; and therefore it was moved to stay the proceedings, the constant practice being, for the Chief Justice to set his hand under the answer on the back of the writ. *Sed per curiam*, At common law it was not required that officers should sign returns; and the statute of *York* makes it necessary only for sheriffs: and though this may be matter of irregularity in *C. B.* we can take no notice of it, but must proceed upon the record, which is indorsed *responsio Roberti Eyre militis capitalis justiciarii infranominati*, which for any thing we know to the contrary may be the hand-writing of the Chief Justice. The writ requires the record to be sent *sub sigillo*, which is never practised. The judgment was affirmed.

Savage *vers.* Dent.

Leaving beer in a cellar is keeping the possession. *Bull. L. N. P. 97. S. C.*

THE lessee of a publick house took another, and removed his goods and family, but left beer in the cellar. And there being rent in arrear, the landlord sealed a lease as on a vacant possession, delivered an ejectment, and signed judgment; which was set aside, the lessee still continuing in possession. And a case was mentioned, where leaving hay in a barn at *Hendon* was held to be keeping possession. It further appeared in this case, that the attorney for the plaintiff knew whither the lessee removed, and might have served him personally, which is not necessary to be done upon the premises (1). And in the case of renting ground, to which there is no house or barn, if it is known where the tenant lives, he must be served.

(1) *Jones on the demise of Griffiths v. March*, 4 Term Rep. 464. S. P.

Honeycomb ex demiss^{us} Halpen et^{us} ux *vers.* Waldron et alⁱ
In Middlesex.

Registering an assignment is not registering the lease.

THE defendant claimed under a lease made in 1730, by Lord *Grandison*, which was soon after mortgaged, and in 1731, sold out and out to the defendant. The original lease was not registred, but the first mortgage of it, and the defend

ant's purchase were. And it not being a lease at a rack rent, the question was, whether this was a registry within the meaning of 7 Ann. c. 20. And the Chief Justice held it not to be sufficient; for the act says, the deed under which the party claims, with the witnesses' names, shall be registred; and of this a subsequent purchaser can have no notice by the bare registry of the assignment, and it is also required that the original be produced to the officer.

7 Ann. c. 20.

Wickham *vers.* Hobart.

[1065]

THE sheriff of *Middlesex* moved to discharge a rule to return his writ, upon affidavit that the defendant was a menial servant of the lord *Say and Seale*, and that my lord had claimed him upon his being arrested, upon which he had discharged him. But it appearing to the court, that the defendant was an attorney, and that it was a standing order of the House of Lords, 24 March 1696, that no common attorney or solicitor, though employed by a Peer, shall have privilege; the court refused the motion, and ordered the sheriff to return his writ.

An attorney though servant to a Peer has no privilege of Parliament.
Caf. temp. Hard.
348. 3. C.
4 Bac. Abr. 290.

Boyfield *vers.* Brown. At Guildhall.

UPON the execution of a writ of inquiry before the Chief Justice, it appeared that the defendant was an insurer to 200*l.* upon corn (1), the value of which was 217*l.* that the corn was so damaged in the voyage, that it sold only for 67*l.* and the freight came to 80*l.* And upon this the question was, whether as the freight, which the plaintiff was obliged to pay, exceeded the salvage; this was not to be considered as a total loss.

Where salvage falls short of the freight it is a total loss.

And for the plaintiff it was insisted, that he ought not to be in a worse condition, than if his corn had gone to the bottom of the sea: for then he would have had no freight to pay, and now that the voyage has been performed, whereby the freight is become due, he has a right to apply the salvage to discharge that.

(1) In the year 1749, subsequent to this determination, the *London* underwriters introduced a memorandum at the foot of their policy by which it is declared that "corn, fish, salt, fruit, flour, and seed are warranted free from average, unless gene-

ral, or the ship be stranded;" and in *Mason v. Skurray, Sittings after Hil. Term 1780. Park on Mar. Insur.* 115. a loss similar to the present was held to be a *partial one*, and to come within that exception. *Vide also Bailie v. Modigliani, ibid.* 117.

It was proved to be the usage, where the salvage exceeds the freight, to deduct the freight out of the salvage and make up the loss upon the difference.

For the defendant it was insisted, that as his insurance was upon the corn, and the whole did not perish; he ought in making up the loss to deduct the salvage: but no instance could be shewn on either side of an adjustment, where the freight exceeded the salvage.

The Chief Justice was of opinion, that within the reason of deducting the freight when the salvage exceeds it, the plaintiff was in this case, wherein it fell short, intitled to have it considered as a total loss. And the jury found for the plaintiff accordingly.

[1066]

Dominus Rex *vers.* Morgan. At Guildhall.

12 Geo. 1. c. 29.
Though the
time in a tempo-
rary law is ex-
pired, yet if it
be continued,
facts may be laid
to be done by
virtue of the first
law.
Lutw. 225. 221.

IN an indictment for perjury in an affidavit to hold to bail, it was laid to have been taken by virtue of 12 Geo. 1. c. 29. which was a temporary law for five years, and after continued by 5 Geo. 2. c. 27. which has also altered it in some respects. And for the defendant it was insisted, that it should have been laid to have been taken by virtue of the latter act; especially as it is not barely an act for continuance, but has made several alterations in the former. *Sed per* Chief Justice, When an act is continued, every body is estopped to say it is not in force. And as it is not altered in this respect, it is but a common continuance *quoad hoc*. So the defendant was convicted.

Between the Parishes of St. Nicholas and St. Peter in Ipswich.

An apprentice
bound for four
years only, gains
a settlement.
Burr. Sett. Ca.
91. more full,
and Sett. Ca.
Ed. 1750. vol. 2.
p. 231. No. 162.
S. C.
Caf. temp. Hard.
323. S. C.

UPON a special order of sessions, it was stated, that *James Blythe* in 1706, was put apprentice in *St. Peters* for four years by indenture; and that he lived there, and served the time; but in as much as he was not bound for seven years, as 5 *Eliz. c. 4.* requires, the sessions adjudge it no settlement.

And the 41st section of that statute was insisted on, to support the order: which declares, "That all indentures, covenants, " bargains, of or for the having or taking any apprentice, other- " wise to be made or taken, than is by that statute ordained, " shall be clearly void in law to all intents and purposes." And one of the former regulations is, that the binding shall be for seven

seven years. And the case of *Cureden* and *Laland* was relied on *Paf. 4 Geo. 2.* where the apprenticeship was for seven years, but the indentures never stamped; and held to be no settlement, *Ante 903.*

But notwithstanding this, the court was of opinion, here was a settlement; and quashed the order. It appears that between the 26th and 41st sections, there are many regulations, what sort of persons shall take apprentices, and what not; which are never regarded. And it would be of mischievous consequence now, to refer this last section back to all the rest. They said the word *void* must be construed *voidable*; as on the statute *Westm. 2. finis ipso jure fit nullus*, it is yet a discontinuance. *Hob. 166.* And on 23 *H. 6. c. 10.* you must plead specially, and cannot avoid a bail bond on *non est factum*. Here the indenture has had its effect, and neither master nor servant have taken advantage of the objection: and as to the case of *Cureden* and *Laland* on 8 *Ann. c. 9. sect. 43.* there were words prohibiting the giving the indenture in evidence; and admitting improper evidence is always a ground to quash (1).

[1067]

Rex v. Halbeck,
Burr. S. C. 200,
S. P.

And it was said to be a vulgar error, to think the 13 & 14 *Car. 2. c. 12.* was the first act about settlements; for in *Rassal's* statutes it appears, that so long ago as 27 *H. 8. c. 25.* and in *Edward the Sixth's* time, there were laws to that purpose.

13 Ric. 2. c. 7.
19 Hen. 7. c. 12.
22 Hen. 8. c. 12.

(1) The court, in establishing the distinction between these cases also relied upon the words in the 39 sect. of the stat. where speaking of the duty not being paid, it not only says that the indentures shall be void, but adds, "and not available in any court or place, or to any purpose whatsoever."

Dominus Rex vers. Eyre. In Canc.

TWO *significavit*s were quashed, being only said to be in a cause which came by appeal concerning a matter merely spiritual: for per Lord *Talbot*, we are not to lend our assistance, but where it appears clearly they have jurisdiction; and are not to trust them to determine what is a matter merely spiritual. It is no more than saying, it is within their jurisdiction, which is never endured. In *Fowler's* case in *Salk. 293.* it was in *causis parium ecclesiasticorum*, and held not sufficient (1).

Excommunicato capiendo.

(1) *Vide Regina v. Doctor Watson, 2 Ld. Raym. 817. 2 Burn's Eccl. Law 226.*

Hilary Term

10 Georgii 2 Regis. In B. R.

Philip Lord Hardwicke, *Chief Justice*.

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

William Lee, *Esq;*

Dudley Ryder, *Esq;* *Attorney General*.

John Strange, *Esq;* *Solicitor General*.

} *Justices.*

North *vers.* Wiggins.

R. If an attachment goes absolutely where contemptuous words are sworn only by one witness.
Salk. 84.

THE defendant on service of the process abused the officer, and spoke contemptuous words of the court. And on motion for an attachment at once, it was doubted, whether when such words are sworn by one person only, the rule should be absolute, or only to shew cause: the rule in Chancery requiring two affidavits, to deprive the party of the benefit of shewing cause. But in this case there being a supplemental affidavit, the point was not determined (1). However the Chief Justice said, he should be unwilling to establish a practice that would put it in the power of one hardy man, to hinder another of an opportunity of defending himself, before he was restrained of his liberty.

(1) *Vide Rex v. Kendrick. Say. Rep. 114.*

Dominus Rex *vers.* Webb.

Certiorari to Old Bailey.
Ante 549. 583.
717. 1049.

A *Certiorari* was granted to the Old Bailey in perjury *ad instantiam defendantis*, on an affidavit that the prosecutor's attorney was under-sheriff of *Middlesex*, and attended the grand jury on finding the bill,

Dominus Rex vers. Inhabitantes de Glassenby, in Com' Cumberland.

AFTER traverse of a writ of *noctanter*, where the jury found 17*l.* damages, the question was, whether the prosecutor could have costs; he insisted that by the statute of *Gloucester* costs are given in all cases where damages are recovered. On the contrary it was said, this was a criminal proceeding, in which the inhabitants could recover no costs if they are acquitted. That costs are a penalty, and the acts given them to be taken strictly. *Salk.* 205. And of this opinion was the court, there being no instance of costs being given on these proceedings, where the inhabitants are brought in collaterally, on the jury's finding that the malefactors are unknown.

No costs upon a writ of *noctanter*.
Caf. temp. Hard.
355. more full.

Carth. 239. 242.
Lutw. 141. 155.

Harris vers. Bernard.

THE plaintiff in an action against the sheriff, described a bill of *Middlesex* as the precept of the King: and on *nul tiel record*, it was objected, that it ought to be set out as the precept of the court, the words being *præceptum est vicecomiti*, as the award of the court.

A bill of *Middlesex* is well described as the precept of the King.

E contra it was insisted, that in every *latitat* it is set out with, "Whereas *We* lately commanded our sheriff:" And in 2 *Saund.* 52. 151. it is set out in this manner. *Et per curiam*, Judgment *quod perfecit recordum*.

Dominus Rex vers. Robins.

UPON motion for a new trial on behalf of the defendant in an information in the nature of a *quo warranto* for the office of mayor of *Tintagel*, the question on which the defendant's title turned was, whether the former mayor had a right to name two elisors to return a jury, if the town-clerk, who might nominate one, was absent or refused. The second elisor nominated by the mayor was called as a witness, to prove the custom; and it was objected to his competency, that he having acted under such a nomination, was liable to an information, and therefore could not be examined. And Mr. Baron *Thompson*, who tried the cause in *Cornwall*, rejected him. It was now moved for a new trial, for that the objection went only to his credit: and 2 *Roll. Abr.* 685. pl. 3. was cited, where *A. B.* and *C.* were severally indicted for perjury in proving a bond, and allowed to be witnesses for each other. 2 *Lev.* 231. 236.
2 *Sid.*

A corporator who has acted under a bare authority may be a witness to prove the usage, under which he had been appointed.
Bull. L. N. P.
291. S. C.

2 Sid. 109. Salk. 690. (1). *Et per curiam*, The boundaries between what goes to the credit, and what to the competency, are very nice, and the latter carried too far: in this case he was but an officer for the day, whose power has long since been at an end. It was a bare authority, and not an interest: and nothing is more common, than to examine former mayors as to the right, though there is no limitation to informations (2). We think this goes only to his credit, and there ought to be a new trial on payment of costs.

(1) *Et vide* Gilb. Law of Evid. 3 ed. 135. The opinion of Ashurst J. in *Walton v. Shelley*, 1 Term Rep. 301—2. and *Rex v. Fletcher*, ante 633.

(2) But see *Rex v. Dickin*, 4 Term Rep. 282. And now by 32 Geo. 3. c. 58. informations in the nature of *quo warranto* for the

exercise of any office or franchise in any city, borough, or town corporate. Whether exhibited with leave of the court, or by his Majesty's Attorney General, or other officer of the crown in behalf of his Majesty, are limited to six years from the day on which the defendant was admitted and sworn into such office.

Moor *vers.* The Mayor and Jurats of Hastings.

A fine certain may be alleged as a reasonable fine. Cal. temp. Hard. 353. 362. S. C.

MANDAMUS to admit the plaintiff to his freedom, in which the custom was alleged, that the eldest son of a freeman born in the town after his father's admission, had a right to his freedom, paying a reasonable fine: and issue being joined upon the custom, the proof was of a constant payment of 6s. 8d. And it being objected, that this was proof of a fine certain, whereas it was laid to be a reasonable fine, which they construed an uncertain fine; the Chief Justice saved it to the defendants.

And upon great debate in court, the *posita* was ordered to the plaintiff: the proof being well enough, for a reasonable fine does not *ex vi termini* import an uncertain fine; and if it may be applied either way, it is well enough laid. In cases of a certain demand the legal description has been by the word *rationabilis*. Thus with respect to aids, which by *Westm.* 1. c. 36. are fixed at a sum certain, for knight service lands so much, and so much for socage lands; the writ in the *Register* 87. a. is *rationabile auxilium*. So at common law the wife was intitled to a third part of the goods of the husband, and yet the writ is *de rationabili parte bonorum*. *F. N. B.* 122. b. And though in *Co. Ent.* 646. an uncertain fine is called *rationabilis denariorum summa*; yet there is a measure to go by, the value of the land: but here is no such thing to estimate it by, or to found an opinion what is reasonable or not. Franchises are all of equal value; and therefore reasonable in this case must be certain, there being nothing that can vary it and be reasonable, and what is reasonable must be determined by what is usually paid.

Easter Term

10 Georgii 2 Regis. In B. R.

Philip Lord Hardwicke, *Chief Justice.*

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

William Lee, *Esq;*

}

Justices.

Dudley Ryder, *Esq;* *Attorney General.*

John Strange, *Esq;* *Solicitor General.*

Lord Hardwicke being Lord Chancellor as well as Chief Justice of B. R. came into court 29 April, took the oaths, and heard my motion.

Between the Parishes of Stoke-Prior and The Inhabitants of the Manor of Grafton.

A Poor person was removed to *Grafton*: and on appeal it was stated to be an extraparochial place, formerly a seat of the Earl of *Shrewsbury*, consisting of a capital messuage and three lodges in the park, but since converted into five houses and farms: and the sessions adjudge it a *ville*, that ought to maintain its own poor. This was moved to be quashed, upon the authority of the case of *Denham v. Dalham*, *Hil. 8 Geo. 2.* and a rule was made to shew cause.

Five houses in an extraparochial place do not constitute a *ville*.

Burr. Sett. Ca. 101. and *Seff. Ca.* ed. 1750. vol. 2. p. 217. No. 153. S. C. Ante 1004.

Afterwards, on an affidavit of service, the rule was made absolute, this not appearing to have the reputation of a *ville*.

Dominus Rex *vers.* Green.Dominus Rex *vers.* Roper.

Practice.

INFORMATIONS were granted for perjury on the trial of an information for a conspiracy; and all the parties prosecuted agreeing, the court on consent arrested the judgment on the conspiracy, and quashed the two other informations. *Quod nota*, for it has not been usual so to do, whereby such prosecutions are stifled, and the Attorney General never grants a *nolle prosequi* in such cases, though by consent.

Saltern *vers.* Wynné.

An executor is not to pay costs of error brought by him upon a judgment against his testator on going before the Master.

Caf. temp. Hard.
367. S. C.
Skinn. 400.
3 Lev. 271.
Carth. 281.
Comb. 228.
4 Mod. 244.

Ante 871. and the note.

Ante 699. and the note.

AN executor brought error on a judgment against the testator upon bond: and after affirmance, moved on the act for amendment of the law, to pay principal, interest and costs. It was insisted, that as he came for a favour to save the penalty, it was but equitable he should pay the costs in error which he had put the plaintiff to; for if the plaintiff had taken execution, equity would never punish him for taking those expences out of the penalty: and the case of *Merril v. Jocelyn*, Trin. 13 Ann. B. R. was cited for that purpose.

E contra were cited *Baynham v. Matthews*, Trin. 4 Geo. 2. where an executor discontinued without costs, and *Sifney v. Newin*, Pasch. 12 Geo. 1. Upon the authority of which case, the court determined, that as by law the executor was not to pay costs upon a writ of error (1), a court of law could not direct them to be taxed, though there was a penalty.

(1) It is otherwise where the original judgment is conditionally *de bonis propriis*. *Caswall v. Norman*, ante 977. and indeed in all cases where he would be liable to costs in the original action. *Williams & al' v. Riley in Cant.* Scacc. 1 H. Black. 366.

Caswall *vers.* Martin.

Appearance cures defect in process.
Caf. temp. Hard.
369. S. C.

THE *latitat* left out the words *de placito transgressionis*. Common bail was filed by the plaintiff; a declaration left in the office, which the defendant took out, and then moved to stay the proceedings. And upon shewing cause, *Strange* insisted, that the error in the process was cured by the appearance, and

and cited *Salk*. 95. and the case of *Widdrington v. Charlton*, where in an appeal of murder it was so held. So *Pasch.* 9 Geo. 2. *Morgan v. Luckup*, there was no *English* notice under the process, and yet taking the declaration out of the office was held to cure it. Whereupon the rule to stay proceedings was discharged (1).

Ante 1044.

[1073]

(1) *Wright & al' v. Miller, M.* and see *Marquand v. Mayor &c. of* 21 Geo. 3. *Tidd's Prac. of K. B.* 98. *Boston. Barnes* 416.

Mendapace *vers.* Humphreys.

THE affize day at *Winton* was on *Wednesday*: and on the *Monday* night before, the notice of trial was countermanded to the agent in *London*. And the court held, it did not save costs; and that being given in town, it should be four days; if to the attorney in the country, two days would be sufficient. *Vide ante* 849. 14 Geo. 2. c. 17.

A countermand in town must be four days before the affizes. *Caf. temp. Hard.* 369. S. C.

The Case of the Coroner of Westminster.

HE returned an inquisition, finding a *felon de se, non compos.* And it was moved, that he might be obliged to return the depositions; but the court refused to make any such rule, there being nothing depending before them, to make it necessary.

Coroner not obliged to return depositions.

May *vers.* May.

On a Trial at Bar before Page, Probyn and Lee, Justices.

IN a question upon the plaintiff's legitimacy, he produced the general register of the parish, wherein he was entered as the son of his father and mother, in the same manner as lawful children are entered; this register the clerk said, was a book to which the entries were made once in three months, out of the day-book, wherein the entries are made immediately after the christening, or next morning.

Day book from whence the register is made up not allowed as evidence to contradict the latter in a question of legitimacy (1).

To encounter this, the defendants asked him if any notice was taken of bastards; and he said, their method was, to add *B. B.* which stood for *Base Born*. And then they offered the day-book, from whence the other entry was posted, in which *B. B.* was in-

(1) *Bull. L. N. P.* 247. *Gilb. Law of Evid.* 3 ed. 76.

ferted; and insisted, that it was the original entry. And this being opposed, the opinion of the court was taken. *Page* Justice was for allowing it to be read; but the other two Judges were against it, saying, the other was the only register, and there could not be two registers in one parish. So the book was rejected.

[1074]

Dominus Rex *vers.* Sutton.

Having coining
tools is indict-
able.
Caf. temp. Hard.
370. S. C. more
full.
See 2 Black.
Rep. 807. 822.
1 Hawk. P. C.
ch. 17. sect. 66.
p. 101.
1b. sect. 75.
p. 103.

HE was convicted at *Northampton* assizes, for unlawfully having in his custody and possession two iron stamps, with intent to impress the scepters on sixpences, and to colour and pass them off for half guineas. And Lord *Hardwicke*, who tried him, having some doubt whether the bare having them in his custody, without shewing he used them, or did some act to procure them, was indictable; directed a *certiorari* to be brought. And after it had been twice argued, the court was of opinion that it was well enough: for coining was the prerogative of the crown at common law: that this could not be a casual having them innocently, or coming to him as executor; because it was laid, and found, that he had them with an intent to impress. 3 *Inst.* 18. says, the person may be imprisoned, in whose custody such instruments are found; and shall he be imprisoned for what is not indictable? Lading wool is lawful, but if it be with an intent to transport it, that makes it an offence: here the intent is the offence; and the having in his custody, an act that is the evidence of that intent. We must not be too nice in these indictments, which Lord *Hale* in *Hist. P. C.* 193. complains of the courts. The defendant was fined 6s. 8d. to stand in the pillory at *Charing-cross*, and suffer six months imprisonment, until his fine paid.

Trinity Term

*10 Georgii 2 Regis. In B. R.

• 10 & 11. See
Burr. Sett. Cal.
167.

Sir William Lee, *Knt. Chief Justice.*

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

Sir William Chapple, *Knt.*

} *Justices.*

Dudley Ryder, *Esq; Attorney General.*

John Strange, *Esq; Solicitor General.*

Wharton *vers.* Richardson, *Vid'.*

A *Scire facias* was brought against the defendant as administratrix of her husband, on a judgment against him for 1,500*l.* and after two *nichils* returned, a *scire fieri* inquiry was taken out, and the defendant attended the execution of it, in order to lay the state of the assets before the jury; but the plaintiff insisting, that the award of execution on the former writs was in point of law an evidence of assets, a *devastavit* was found to 1,117*l.* 18*s.* 1*d.* In *Hil.* 8 *Geo.* 2. she appeared to the *scire fieri* inquiry, pleaded *plene administravit*, and traversed the *devastavit*. And notice of trial being given and countermanded, and nothing further done upon it; she in *Mich.* 10 *Geo.* 2. moved to have the award of execution set aside, and to be admitted to

Scire fac. against an administratrix on a judgment against her husband after two *nichils* returned, a *scire fieri* inquiry is taken out; the award of execution on the former writs is evidence of assets (1). But where there has been no *scire fac.*, and only two admit defendant *Wills.* 125. 2. C.

nichils returned, the court, on motions, will set aside the award of execution, and the defendant may plead, if he comes in time. Otherwise if he acquiesce upwards of two years (2). 1 Lord Raym. 591. *Contra per Gould J.*

(1) *Vide Earl v. Hinton, ante*

(2) *Vide Mitford v. Cordwell,*

post. 1198.

plead; it being no purpose to expect relief upon the trial of the traverse: and cited *Salk.* 93. 264. to shew, that where there has been no *scire fac*i, and only two *nichils*, the court will relieve upon motion, and not put the party to an *audita querela*: and the state of the real assets was proved to be 130 *l.* which she offered to deliver up, and be examined upon interrogatories, if the plaintiff was dissatisfied with the account.

[1076] The court was greatly inclined to relieve her: but upon consideration of her long acquiescence, and the several steps taken subsequent to the award of execution; they thought she came too late, and for that reason only, refused to interpose.

Stone, vers. Atwell.

If an infant refuses to name a guardian to appear by, the plaintiff may do it for him.

BY 12 Geo. 2. c. 29. if the defendant does not file common bail in time, the plaintiff may do it for him: in this case the defendant was an infant, and had appointed no guardian by whom to appear: and the court made a rule, that the plaintiff should name a guardian for him, if he refused to do it himself (1).

(1) *Shipman v. Stephens*, S. P. *Gladman v. Bateman*, Barnes 418. in C. B. 2 *Wils.* 50. Vide also *Kerry v. Cade*, *ib.* 413.

Dominus Rex vers. The Inhabitants of Bedall in Yorkshire.

If no access of the husband be adjudged, the issue are bastards. Cal. temp. Hard. 362. 379. Bull. L. N. P. 112. Andr. 9. S. C. Ante 923. 940.

AN order was made upon one *Moor*, as the putative father of two bastards born of the body of *Elizabeth* the wife of *Richard Sharplefs*: in which it is stated, that for seven years before, the husband had had no access to her, she having never seen or heard of him all that time, and not knowing whether he was alive or dead; which the justices adjudge to be true, and that *Moor* is the father of them, and order him to provide accordingly.

Upon appeal to the sessions, the case is stated with some variation: that in 1728, she was married to *Sharplefs*, then a soldier in *Mullins's* troop, in a barn, by a person not in the habit of a clergyman: that there had been no access for seven years: but it appearing by a certificate from the commissary general's office, 7th April 1737, and from the evidence of *Simon Clark*son that

that one Richard Sharplefs, who he was told was formerly in Mullins's troop, was mustered as a private gentleman in the third troop of horse guards from 25 June 1733, to 23 February 1736, though Clarkson said he could not take upon him to swear that it was the same Richard Sharplefs pretended to be married as aforesaid: upon this supposition of the husband's being alive, the sessions were of opinion, the children were not bastards, and reversed the order of the two justices.

And now upon debate (the Chief Justice absent) the order of sessions was quashed, and the order of two justices confirmed: for it being stated in both orders, that there was no access, according to the case of *Pendrel v. Pendrel*, Hil. 5 Geo. 2. ante 925. it was immaterial whether the husband was alive or not: but if it was material, here is no evidence to prove it, the identity not being sworn to; or if it was, yet the evidence of his being alive was improper to have been received, and even the marriage itself doubtful.

[1077]

Robinson un', &c. *vers.* Niccolls.

THE plaintiff brought debt upon a judgment, where the money recovered was under 10*l.* but by the addition of costs exceeded it: and he held the defendant to bail, and bail was put in above. Then the defendant moved on the authority of *Gammage v. Watkin*, Pas. 7 Geo. 2. that common bail should be accepted, and Mr. Solicitor General *pro quer'* agreed it to be the rule; but insisted that by actually putting in bail, the defendant was too late in the application: and cited *Laferre v. Johnson*, Hil. 13 Geo. 1. ante 745. where on error an executor gave bail, which he needed not to have done, and the court refused to vacate the recognisance.

Putting in bail where not required, does not bind the court from ordering common bail. Andr. 15. S. C. Ante 975. and the note.

But in this case the court ordered common bail; for the plaintiff, who was an attorney, ought not to have marked his process for bail, and therefore should not take advantage of his own mistake.

Dominus Rex *vers.* The Inhabitants of Butley in Suffolk.

THE question in this case was, whether renting a wind-mill at 14*l.* *per annum* gained a settlement; it having been determined, that a water-mill did. *Salk.* 536. It was said, those

Renting a wind mill is a settlement. Burr. Sett. Ca. 107. and Sett. Andr. 3. S. C.

Ca. ed. 1750. vol. 1. p. 402. No. 320. S. C. Cas. temp. Hard. 391. G g 3 are

are always habitable, but the others often are not. *Sed per curiam*, It is the same as if he had rented land of that value. And *H. 8 Geo. 1. Rex v. St. Mary in Guilford, ante 502.* it was a mill generally, and held a settlement. And so it was in this case (1).

(1) The pauper lived in a cottage which he rented in the same parish. *Vide* the other reports of this case.

Bean *vers.* Elton.

New writ of inquiry, &c. ordered to be made on loss of the former.

N. B. No cause was shewn against the rule.

Andr. 12. S. C.

A Writ of inquiry was executed in *Trin. 1728*, and costs taxed upon it, but no final judgment entered up. And now there being occasion to prove the debt in Chancery, the writ of inquiry could not be found: and a rule was made for a new writ of inquiry and inquisition, according to the sheriff's notes, and that the master should indorse the costs, which by the commitment book appeared to have been taxed, *Vide ante 141. 833. (1)*

(1) 1 *Vent.* 92, 93. 2 *Kely.* 106. *Darby v. Gold, post. 1264.*
Dayrell v. Bridge, Barnes 14.

[1708]

Adams *vers.* Broughton.

A recovery in trover vests the property in defendant.

Andr. 18. S. C.

Kelw. 58. b. S. P.

Per Frowicks,

32 Mod. 145.

In Sutton v.

Moody, per Holt

C. J.

THE plaintiff recovered in trover against the captain, for yarn consigned to him. The captain obtaining an injunction, on shewing the goods were delivered to the defendant the plaintiff brought an action against him, and held him to bail. And the court discharged him on common bail, for by the former recovery the property vested in the captain, the plaintiff having damages in lieu thereof, and therefore in this action he could not say the goods were his.

Burton *vers.* Fitzgerald. At Guildhall.

Sentence of a foreign admiralty condemning a ship as unfit, not to be read in an action on the charter-party.

ACTION on a charter-party, to go to *Calais*, and take corn for *Spain*. The defendant pleaded, that the ship was unfit for the voyage, being rotten, and therefore did not load her. And issue being joined upon the goodness of the ship, and several witnesses examined; the defendant offered

to give in evidence a proceeding in the admiralty court at *Calais*, whereby commissioners were appointed to survey the ship, upon whose report there was a sentence of condemnation. It was objected, that this being a contract under seal on land here, the admiralty there had no jurisdiction, and consequently their sentence void. It appeared that the plaintiff intervened in the suit, and had an inspector of his own nomination put into the commission. And it was insisted by me and others, that faith was to be given to these proceedings; and we are not to suppose, that the same boundaries between courts subsist there as here: and on insurances nothing is commoner than to read protests in foreign admiralties. But the Chief Justice refused to let it be read, this being a contract under seal at land, in which case according to our law the admiralty has no jurisdiction.

Michaelmas Term

11 Georgii 2 Regis. In B. R.

Sir William Lee, Knt. Chief Justice.

Sir Francis Page, Knt.

Sir Edmund Probyn, Knt. } *Justices.*

Sir William Chapple, Knt.

Dudley Ryder, Esq; Attorney General.

John Strange, Esq; Solicitor General.

Turner vrs. Warren.

In action by the
loser at gaming,
special bail shall
be given.
Andr. 70. S. C.
more full.
2a Mod. 295.

THE plaintiff brought his action for 200 *l.* as the loser of so much by gaming. And the question was, upon 9 *Ann. c. 14.* which gives an action of debt at any time within three months against the winner, whether the defendant could be held to special bail; the defendant's counsel comparing it to the case of actions upon penal statutes, where no bail is ever required.

But the court held, there ought to be special bail in this case, which is at the suit of the party grieved, and wherein the defendant is a debtor to the plaintiff. And the clause is to be considered as remedial. And therefore upon consideration, and talking with the other Judges, special bail was ordered.

[1080]

Hamelton vrs. Style.

Wilks vrs. Eames.

Of the costs upon
a special jury.
3 Geo. 2. c. 18.
Andr. 51. 53. S. C.

UPON consideration of the jury act, 3 *Geo. 2. c. 25. § 16.* which says that the party applying for a special jury shall be at the costs of striking the same; the court held, that if the
verdict

verdict goes on that side which moved for the special jury, the extraordinary allowance to a special jury, and all the expences, except what attend the actual striking, should be taxed and allowed against the losing party.

See Hullock on Costs 433.

Skipp vers. Hooke.

UPON error e C. B. it appeared, that the *placita* was of *Ostab.* and *Quinden' Hilar'* before Mr. J. *Denton*, Mr. J. *Comyns* and Mr. J. *Fortescue Aland*, and for the rest of the term before Sir *John Willes* and his brethren. And upon a *certiorari* for the writ of inquiry, it was returned *Tesse Philip Lord Hardwicke*, 27 April, 10 Geo. 2.

B. R. will not judicially take notice who are the Judges of C. B. Andr. 75. S. C.

It was objected, that this was no warrant to the sheriff, it appearing Sir *John Willes* was constituted Chief Justice before the issuing the writ of inquiry, and that therefore it ought to bear *teste* in his name. To which it was answered by the Solicitor General, that though the court had a private knowledge who was Chief Justice of C. B. at that time, yet they could not judicially take notice of it, and Lord *Hardwicke* might be Chief Justice in *Easter* term, when the writ of inquiry issued. Besides, this was an exception to reverse a judgment, in which case the court will never go out of the record; and indeed the proper way to take advantage of this matter was, by motion in C. B. for irregularity. And of that opinion was the court, and the judgment was affirmed.

Ante 1064. Post. 1226.

Cart vers. Marsh.

A Dispute arose between the parties upon cross petitions exhibited to the archdeacon of *Bedford* and commissary of the bishop of *Lincoln*, for leave to erect a monument against a pier in *Dunstable* church, to the memory of their respective ancestors. And upon allegations given on both sides, *Marsh* appealed to the Arches against the admission of *Cart's* allegation; upon which *Cart* moved for a prohibition, insisting, 1. That ornaments were discretionary only in the ordinary, and therefore no appeal would lie; or 2. If it did, yet it must be to the bishop of *Lincoln*, and not to the Arches.

An appeal lies about setting up ornaments in the church. And. 69. S. C. 1 Burn Eccl. Law. 343.

[1081]

But the court held, that though ornaments cannot be set up without the consent of the ordinary (1); yet it must be exercised

(1) *Palmer v. Episcopum Exon'*, ante 575.

according

according to a prudent and legal discretion, which the superior has a right to look into, and correct; and therefore the appeal well lay, as it does in cases of granting administration to one, where there are two in equal degree. And as to its being an appeal to the Arches it was held, that wherever the act is done by a commissary, it is considered as the act of the ordinary himself; and to him no appeal will lie from his own act, and it must consequently be to the Metropolitan. So the rule for a prohibition was discharged.

French *qui tam* *vers.* Coxon.

Practice as to
affidavits in *qui*
tams.
Andr. 25. S. C.

(a) S. C. 1 Ld.
Raym. 370.
3 Salk. 200.
5 Mod. 425.
Holt 364.
12 Mod. 225.
(b) Rep. Cun.
30.
2 Barnard. B. R.
423. 420.

THE action was upon the statute of Usury, 12 Ann. st. 2. c. 16. and a motion to stay the proceedings, because no affidavit was filed of the cause of actions accruing within a year, according to 21 Jac. 1. c. 4. But the court held it not necessary, as well because that act had been held not to extend to subsequent statutes, (Salk. 373, 374.) (a) as also because this very had been determined, Pas. 7 Geo. 2. *Harris qui tam v. Reyney* (b), on 15 Car. 2. c. 18. against buying and selling live cattle: and the practice had never been to file any such affidavit (1).

(1) In *White qui tam v. Boot*, 2 Term Rep. 274. proceedings were stayed in an action upon 25 Edw. 3. st. 4. c. 3. for want of such an affidavit. But *Leigh qui tam v. Kent*, 3 Term Rep. 362. which was an action founded on 21 Hen. 8. c. 13. for non-residence the objection was made after ver-

dict, and it was over-ruled, the case of *White qui tam v. Boot* doubted, and the result of the old cases stated to be, that 21 Jac. 1. c. 4. is merely directory to the officer, and does not control any of those statutes upon which penal actions are to be brought in the superior courts.

Chancy *vers.* Needham.

Practice on entering up judgment on old warrants of attorney.
Andr. 53. S. C.
14 Vin. Abr. 17.
pl. 7.

ON the 11 November about twelve at noon, a motion was made to enter up judgment upon an old warrant of attorney, and an affidavit was produced, sworn the day before, of the party's being alive, and the debt unpaid, upon which the court made the common rule.

The Solicitor General at another day moved to discharge it upon an affidavit, that the defendant died the day the first motion was made at seven of clock in the morning; and insisted that this was by surprize upon the court. And on great debate

the court declared, that if it had then appeared, that the man was dead, they would not have made the rule (1): but they applied the maxim, *feri non debet, factum valet*, to this case: and compared it to the cases *Salk. 82.* and *Fuller v. Jocelyn, ante 882.* And thus suffered the deceit, which had been put upon them, to prevail.

- (1) *Wild v. Sands, ante 718.* S. P. in *B. R. Saville v. Wiltshire, S. P. in C. B. Barnes 270.*

Openheimer *vers.* Levy.

[1082]

IN case *sur assumpsit*, the defendant pleaded in abatement, that the plaintiff was an alien born at *Vienna* under the dominion of the King of the *Romans*, and out of the allegiance of our King: to which the plaintiff demurred. And upon argument it was held, that as by law an alien friend may maintain a personal action, as being allowed to traffick. 1 *And. 25. Dy. 2. b. Broke, Denizen. Yelv. 198.* it is necessary in order to abate the writ, that he should be shewn to be alien enemy, which is not to be presumed, nor the contrary necessary to be replied: and all the precedents are *inimici Domini Regis*. So a *respondes ouster* was awarded.

Plea that plaintiff is an alien must shew that he is an alien enemy.
Andr. 76. S. C. by the name of Hopper against Leppatt, vide 1 Com. Dig. Abatement, (E. 4.) 10.

Clarke *vers.* The Bishop of Sarum.

A *Mandamus* was granted to admit the plaintiff to a canonry or prebend of *Sarum*, and to institute, induct and invest him therein; though it was strongly opposed on the rule to shew cause, as turning the common law remedy by *quare impedit* into another channel. But the court said, that though formerly *mandamus*'s were not so frequent, especially where the party had another remedy; they being found to be more expeditious and less expensive, had been given into of late. And as to there being another remedy; it might be said equally in cases where an assise or an action upon the case would try the right, and yet that was never thought a ground to deny a *mandamus*: so the writ was ordered, but never issued, the parties agreeing to refer the dispute (1).

Mandamus for a prebend.
Andr. 20. 135.
S. C.
Skin. 45.
1 Lev. 108.
1 Vent. 133.
1 Jon. 199.

- (1) In *Powell v. Milbank, 1 nison J. and Lord Mansfield C. J. Term Rep. 401. n.* the present case and though the power of the court is held not to be law. *Per De-* to issue this writ is discretionary, it

it seems now settled, that where a *quare impedit* lies, they will not grant a *mandamus*. *Rex v. The Bishop of Chester*, 1 Term Rep. 396. *Rex v. Marquis of Stafford*, 3 Term Rep. 646. The cases here cited in the margin do not appear to relate to the question. In the report in *Andrews. The King and the Dean and Chapter of Ardmagh*, *Rex v. Dean and Chapter of Norwich*, ante 159. *Rex v. Dean and Chapter of Dublin*, ante 536. are cited in support of the rule. But in the case of the *Dean and Chapter of Norwich*, *Doctor Sherlock* was prebendary by virtue of an act of Parliament, and he had no remedy but a *mandamus* to get into

his stall. In the case of *The Dean and Chapter of Dublin* there was no determination on the point, but the majority of the Judges inclined against the *mandamus*, and there also the object of the writ was to admit the prebendary into his stall. But though the court will not grant a *mandamus* in any case where there exists a specific legal remedy. *Rex v. Governor and Company of the Bank of England*, Dougl. 523. Yet if that remedy is obsolete, as if it be by writ of *affize*, they consider it as an exception to the rule. *Per Buller J.* 4 Term Rep. 404. *Per Grose J.* 3 Term Rep. 652.

Booth *vers.* Garnett.

Awarding the giving a note is the same as awarding payment at a future day.
And. 28. S. C.
short full.

DEBT upon a bond, the condition whereof recited, that the plaintiff and *Gilbert* had submitted a dispute to arbitration; and therefore if the defendant should pay what *Gilbert* should be awarded to pay, not exceeding 20*l.* the bond to be void. On the replication it appeared, that the award was for *Gilbert* to give the plaintiff his note for 18*l.* payable at a future day. And it was insisted upon for the defendant, that his bond was only to pay the money awarded; and therefore as the award was to do a collateral act, it was not within the condition.

But the court said, that awards were to have a reasonable intendment: and all the meaning of this was to give the party time, and is equal to ordering him to pay the money at the future day, without saying any thing of giving a note in the mean time. And therefore they gave judgment for the plaintiff.

Whywall *vers.* Champion.

At Guildhall coram Lee C. J.

IT was ruled, that tobaccoes sent to the defendant, who set up a shop in the country, could not be recovered for as necessities, he appearing to be an infant. For the law will not suffer him to trade, which may be his undoing.

Andr. 28. S. C. more full.

An infant cannot be charged for goods delivered to trade with.

Litch. 169. Salk. 279. Cro. Jac. 454. S. P. Bull. L. N. P. 154. 12 Vin. Abr. 217. [T. b. 4.] pl. 3.

Jarvis *vers.* Hayes. At Guildhall.

IN an action against the defendant as master, for his carman's negligently driving his cart, *per quod* the plaintiff was thrown off from a ladder and bruised. On shewing a release from the master to the servant, the Chief Justice allowed the master to examine the servant; though it was urged, that if the plaintiff fails against the master, he may sue the servant, which is a bias upon the servant. *Strange pro def.* (1)

Servant where witness in action against the master.

(1) Anon. 12 Vin. Abr. 25. pl. v. The New River Company, 4 S. P. Bull. N. P. 77. Green Term Rep. 589.

Hilary Term

11 Georgii 2 Regis. In B. R.

Sir William Lee, Knt. Lord Chief Justice.

Sir Francis Page, Knt.

Sir Edmund Probyn, Knt.

Sir William Chapple, Knt.

} *Justices.*

Dudley Ryder, Esq; Attorney General.

John Strange, Esq; Solicitor General.

Ferguson vers. Rawlinson qui tam.

There may be
costs on error,
though none in
the original suit.
Andr. 113. S. C.

AFTER affirmance of a judgment of *C. B.* for the treble value on the statute of usury; it became a question, whether as the plaintiff recovered no costs in the original action, he could have his costs in *B. R.* upon the writ of error. And upon consideration the court declared, he was intitled to them by the express words of 3 *H. 7. c. 10. in delay of execution*: and that it was the stronger, since 8 & 9 *W. 3. c. 10.* under which the defendant would have been intitled to costs, if there had been judgment for him in *C. B.* and affirmed here. Cases cited for costs were *Cro. El.* 659. 5 *Co.* 101. *Cro. Car.* 145. *Dy.* 77. *E contra Cro. Car.* 425. 1 *Lev.* 146. 1 *Vent.* 38. (1)

(1) *Vide The Archbishop of Dublin v. The Dean of Dublin, ante 262.*

Bennington vers. Goodtitle.

Ejectment lies
for a beast-gate.
Andr. 106. S. C.
Ante 1063.

ON error in ejectment, it was held to lie for a beast-gate which is a term known in *Suffolk*, and imports land as common for one beast (1). And the judgment was affirmed.

(1) *Metcalfs v. Rowe, Cas. temp. Hard. 167.*

Bosworth *vers.* Hearne.

UPON a return of a *habeas corpus*, it appeared, that the suit was by the chamberlain of London upon a by-law made in 15 Car. 2. that no drayman or brewer's servant should be abroad in the streets with his dray or cart after one of the clock in the afternoon between *Michaelmas* and *Lady-day*, and from thence after eleven in the forenoon, under the penalty of 20 s. And a custom was returned, for the city's having the regulation of carts (1).

By-law to confine brewers to certain hours for carrying out drink, good. Cal. Temp. Hard. 405. Andr. 91. S. C. more full.

It was agreed both at bar and bench, that such a custom may be good: but that without a custom the by-law would be void. And the only question disputed was, whether this was a reasonable restraint.

Many objections were made by Mr. Solicitor, arising from the nature of the brewers trade, and the necessity it would put them under of using more carriages, and employing more servants; the consequence whereof would be the raising the price upon the consumer, or lowering the quality of the beer.

But the court said, that as this was only a regulation of trade, of which the city was the best judge; it was enough, that it did not appear unreasonable in itself. And that within the reason on which many of the city by-laws had been held good, they were warranted in granting a *procedendo* (2).

(1) *Vide Payne v. Haughton*, 1 284. S. C. *Rs. Abr.* 364. pl. 5. *Player v.* (2) *Vide Wannell v. Camerar*, *Voe*, T. Raym. 288, 324. 1 Vent. "Civit" London, ante 675.
21. 2 Keb. 420, 501. 1 Sid.

French, *qui tam vers.* Wiltshire.

AFTER verdict for the plaintiff for 500 l. penalty for keeping a *Pharo* table, it was moved in arrest of judgment, that the *venire* was *de corpore comitatus*; whereas actions upon penal statutes are excepted in the act for amendment of the law. But the court held, that since the jury act 3 Geo. 2. c. 25. the sheriff could return no other than the general pannel, and therefore the proviso was virtually repealed: or if not, yet the 5 Geo. 1. c. 13. had cured this, either as a defect in form or substance. And

Since the jury act the *venire facias* must be *de corpore comitatus* in the actions excepted by the act for amendment of the law. But see now stat. 24 Geo. 2. c. 12. s. 3. n. 2d ed.

And actions of debt are not within the proviso in the last mentioned act (1).

(1) *Merrick v. Lord Offulston*, turn. And S.P. on 9 Ann c. 14. s. 1. *Andr.* 115. S. P. on the statutes of for money won by gambling at one hue and cry. *Wynne v. Middleton*, sitting. *Frederick Bart. v. Lookup*, 1 *Wils.* 125. S. P. in an action on 4 *Burr.* 2018. 7 & 8 W. 3. c. 7. for a false re-

[1086]

Berrington *vers.* Parkhurst et al^s.

There must be an actual entry to avoid a fine, and the demise cannot be laid on a day before the entry.

4 Bro. Par. Ca. 353.
Andr. 125. S. C.

UPON a trial at bar in ejectment on the demise of *John Dormer*, Esquire, for a manor and lands in *Bucks*, a special verdict upon the family settlement was found; but as neither the King's Bench nor House of Lords gave any opinion upon that part of the case, it is unnecessary to state the same.

As to the point on which the judgment was given, it was shortly thus. The defendants (as disseisors for argument sake) levied a fine in 1730. To avoid this the lessor of the plaintiff made an actual entry on 6th of *January* 1731. and in *Hilary* term after brought his ejectment, and laid the demise 1 *October* 1731. which was three months before the actual entry.

And it was insisted on for the defendants, 1. That an actual entry was necessary to avoid the fine. And 2. That the demise could not be laid before the lessor had regained the possession by the actual entry.

As to the first of these, it was argued for the plaintiff, that the 4 *Hen.* 7. c. 24. was in the disjunctive, so as the claim is pursued by action or lawful entry, and that therefore the ejectment is sufficient, if the actual entry was out of the case.

And as to the second it was argued, that upon the entry the lessor's estate was re-vested, and he might maintain trespass for an act done during the disseisin. And unless he was allowed to lay his demise backwards, he could never recover the *missus* profits.

To which it was replied, 1. That ejectments were not in use at the time of making the statute, and real actions only were intended: and if ejectments would do, all the questions that have been made about actual entries must have fallen to the ground by the answer, that an ejectment was a suit that came within the alternative, those questions having all risen in ejectment.

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1 *Saund.* 319. 1 *Vent.* 42. 1 *Mod.* 10. 2 *Keb.* 555. *Skin.* 423. And *Hil.* 2 *Ann.* 1703. 30th January, at a meeting of all the Judges (except *Price*) it was resolved, that in the case of a fine, there must be an actual entry within five years, and that the confession of an entry to deliver a lease in ejectment shall not operate to avoid a fine. And the act for amendment of the law, which says, the claim or entry shall be of no effect to avoid a fine, unless an action is commenced within a year after; shews it must be an actual entry to be prosecuted with an action, and that the action is not such an entry as is required.

[1087]

And as to the second point, it was observed, that the constant doctrine has always been, that one out of possession cannot make a lease; and therefore in verdicts it is always found that the lessor entered and was seised *prout lex postulat*. That here was a time when certainly the lease was void, *viz.* from the making to the entry; and the question in ejectment always is, whether the lessor could then make the lease; and he is nonsuited if he lays the demise before the title accrued; that supposing this may affect him as to the *mesne* profits; it is his own *laches*, and the owner is supposed to live upon them all the while.

And upon this point the King's Bench gave judgment for the defendants. And on error in Parliament, the Judges were all ordered to attend, when, after two days argument at the bar, two questions were put to the Judges. 1. Whether an actual entry was necessary to avoid the fine. To which they all answered, that it was. 2. Whether the demise being laid before the time of the first entry, this ejectment could be maintained. To which they answered, It could not. So without putting any question upon the merits, the judgment was affirmed with 10 *l.* costs (1.)

(1) *Vide Fitchet v Adams, post.* an actual entry is not necessary to avoid a fine at common law.
 118. *Oates v. Brydon*, 3 *Burr.* *Jenkins v. Pritchard*, 2 *Wils.* 45.
 27. *Goodright v. Cator*, *Doug.* and see *Musgrave v. Shelby*, 1 *Wils.* 214.
 30. But this is to be understood of a fine with proclamations, for

Collins vers. Butler. At Guildhall.

A Note was payable 27th December 1732. The drawer shut up his house, and went away the November before. And the question was, whether in general a demand upon the drawer is necessary before the indorser can be charged; and if it was, whether in this case the plaintiff had shewn sufficient, in proving the shutting up the house.

There must be a demand on the drawer of a promissory note before indorser can be charged.

As to the first the Chief Justice ruled, that a demand on the drawer was necessary, as was determined in *C. B. Pasch. 4 Geo. 2.* on great debate (1). And in this particular case, he held the plaintiff had not gone far enough, but ought to shew, that he had inquired after the drawer, or attempted to find him out.

(1) Because the drawer of a note is after its indorsement in the nature of an acceptor of a bill of exchange on whom a demand must be made. This point upon which six Chief Justices are said to have divided themselves equally in contradictory opinions, is now considered as fully settled, and the distinction between notes and bills of exchange in this respect well established. *Vide Pardo v. Fuller, Com. Rep. 579. Heylin v. Adamson, Burr. 669. B. L. N. P. 277. Bromley v. Franier, ante 441. and Vide Hamilton v. Mackrell, Cas. Temp. Hardw. 322.*

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Easter Term

11 Georgii 2. Regis. In B. R.

Sir William Lee, Knt. Chief Justice.

Sir Francis Page, Knt.

Sir Edmund Probyn, Knt.

Sir William Chapple, Knt.

}

Justices.

Dudley Ryder, Esq; Attorney General.

John Strange, Esq; Solicitor General.

Dominus Rex *vers.* Bainton.

AN indictment at the quarter-sessions for perjury at common law, was quashed for want of jurisdiction; and said to have been done so before about three years ago. *Rex v. Westliffe* (1). What indictment is quashable.

(1) *Regina v. Yarrington*, *Salk.* p. 60. 4 *Com. Dig.* Justice of the Peace. (B. 1.) 529.

Dominus Rex *vers.* Harwood.

THE defendant being a justice of peace, was convicted on an information, for a conviction by him made of an ale-house-keeper, who was never summoned or heard. And *Sir Thomas Abney* moved it as of course, to dispense with his appearance. This was opposed, unless there was some reason given, or affidavit made. And upon debate the court resolved, it was

Practice.
And. 153. 3. C.
Vide *Salk.* 56.

was not of course, and the defendant afterwards appeared in person.

Hooper *vers.* Shepherd.

Debt lies on a deed, and the jury must give a verdict as to the whole demand. Andr. 156: S. C. more full. Vide 1 L. Raym. 324. 2 L. Raym. 1518. Cro. Eliz. 133. 3 Lev. 55. Hardr. 166. Gilb. C. B. 3d ed. 156. 5 Com. Dig. Pleader. (S. 19.) 519.

ERROR of a judgment in C. B. in debt upon a charter-party, whereby the defendant was to pay fifty guineas per month. And the plaintiff states, that 652 l. 10 s. was due for the whole, 152 l. 10 s. whereof he had received, and the remainder was 500 l. for which the action was brought. The defendant pleaded, that he had paid at the rate of fifty guineas per month for all the time the ship was in his service: and issue being taken, that he did not; the jury find, that 357 l. 11 s. remained unpaid, but say nothing as to the rest of the 500 l.

It was first objected, that covenant, and not debt, was the proper action: but this was got over, it being founded upon a deed, in which case debt will lie, according to 1 Roll. Abr. 591. Cro. Eliz. 561, 758, 1 Roll. Abr. 597. Sti. 31, 3 Lev. 429.

But then it was objected, that this was an imperfect verdict, the jury not having answered to all they were charged with; according to Co. Litt. 227. a. 1 Roll. Abr. 802. pl. 5. Cro. Jac. 31, 113. 3 Lev. 55. Mr. Solicitor would have supported this by observing that this was a special issue, the substance whereof was, how long the plaintiff was unpaid for, and therefore differs from the general issue of *nil debet*, where he admitted the jury must answer to the whole, else the defendant might be called upon again: but here there was no such danger, this being a determination of what is due upon the foot of all the time in the charter-party, and consequently ends all the question in dispute between the parties, and no new action can be brought for any of the time: and wherever the substance of the issue is found, it is sufficient. Co. Litt. 227. a. Yelv. 148. 9 Co. 67. 112.

But the court held this case was not thereby distinguished from the general rule, and therefore reversed the judgment.

Chapman *vers.* Maddison.

B. R. will expect a return of a *latitat* to Durham. Andr. 191. much fuller.

A *Latitat* was offered to the proper officer of the Bishop of Durham, and a demand made upon him to issue the usual mandate for an execution of the process. The officer refused to receive it, upon pretence that the process of B. R. would not run in the county palatine. And upon motion against him for an attachment.

attachment, a long argument was made by the Bishop's counsel, to shew the antiquity and dignity of counties palatine, and that no process will run there, but from the Exchequer, which is considered as a prerogative suit. But the court on consideration declared, that whatever might be the case, when the question came properly before them upon a claim of consuance, or plea to the jurisdiction; yet they would never endure, that the officer should refuse to receive their process. They cited *Lee v. Ransome*, Mich. 9 Geo. 2. where to a *latitat* into the county palatine of Lancaster, it was returned, that the writ lay not; and the court quashed the return, as not being a proper way of bringing the point in question. They said the true meaning of the expression *Breve Domini Regis non currit* is, that the court cannot write directly to the sheriff, as they do in other cases. In this case the rule for an attachment was made absolute (1).

Vide Harg.
Tracts, 417,
&c.

(1) So a *latitat* runs into Wales. *v. Thomas*, 1 Wils. 193. and *Jones Perry v. Jones*, Doug. 213. *Lloyd v. Jones*, ib. 205. are *contra*.
v. Jones, ib. n. (10.) but *Lamplsey*

Otway *vers.* Ramsay.

THE great question in this case (which came from Ireland) was, whether debt would lie there upon a judgment in B. R. in England. And after two solemn arguments, upon which the court strongly inclined that it would not, a third argument was appointed. But the plaintiff in error, who was plaintiff and had judgment against him below, declining any further argument; the judgment in Ireland was affirmed, without any opinion delivered by the court, further than what was said upon breaking the case at the former arguments.

Debt lies not in Ireland on a judgment in England (1).
14 Vin. Abr. in notes 569. pl. 5.

(1) Vide *Walker v. Witter*, Doug. 1. and the cases there cited.

Dominus Rex *vers.* Lisle.

UPON an information in nature of a *quo warranto* for the office of mayor of *Christ-church*, the defendant's title depended upon two questions, on which a special verdict was found. 1. Whether one *Goldwyer*, who presided at the election of the defendant, was a mayor *de facto*. And, 2. If he was, whether the presiding of a mayor *de facto* in this case was sufficient to make a title in the defendant against the crown.

H b 3

A bare swearing in and acting does not make a man an officer *de facto*, and unless there is some form of election he is a mere usurper.

As Andr. 163. S. C. much fuller.
Vide 2 Barnard. B. R. 193. 164.

As to the first point, the fact as found was, that *Goldwyer* was never elected mayor, or ever had any lawful right or title to the office; but that under colour of being elected, he was in fact presented and sworn at a court-leet, and acted all the year, though an information was depending against him, in which after the year there was a judgment of *ouster*; but it did not appear there was any rightful mayor at the same time.

[1091] And upon this state of the case the court were all of opinion, that *Goldwyer* must be taken to have been a mere usurper, and that in order to constitute a man an officer *de facto*, there must be at least the form of an election, though that upon legal objections may afterwards fall to the ground.

The other point was left undetermined, as not being necessary to deliver any opinion upon, as it was not pretended that the presiding of a mere usurper would do, and the court had determined *Goldwyer* was no more. But they strongly inclined, that the presence of a mayor *de facto* recently prosecuted, and against whom judgment of *ouster* had been obtained, would not be sufficient to authenticate the defendant's election (1). The court gave judgment for the King.

(1) *Vide Rex v. J. Malden*, 4 Burr. 2135, 2140.

Trinity Term

* 11 Georgii 2 Regis. In B. R.

* 11 & 12 See
Burr. S. C. 120.
pl. 38. note to 2d
ed.

Sir William Lee, *Knt. Chief Justice.*

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

Sir William Chapple, *Knt.*

} *Justices.*

Dudley Ryder, *Esq; Attorney General.*

John Strange *Esq; Solicitor General.*

Dominus Rex vers. Wykes et al'.

IT was held, that though the complaint of a *pauper's* settling may be to one justice, yet the examination ought to be by two, and those that sign the order of removal. *Salk. 488. (1).*

Examination of
a *pauper* must be
by both the jus-
tices.
Andr. 238. S. C.
more full.

(1) *Rex v. Cohn St. Alkwin's*, and when they are in different
Burr. S. C. 136. Rex v. Howarth, counties, yet it is only voidable.
2 *Bott. by Const. 769. pl. 701. Rex v. Stotfold*, 4 *Term Rep. 596.*
S. P. But though the order be *Nol. Rep. 66.*
signed by the justices separately,

Andrews vers. Fulham.

IN ejectment on the demise of *Edward Jones, Esq;* a case was made for the opinion of the court.

That *Robert Waith* being possessed of leasehold messuages in
London, by his will in 1686. devised the same to his wife for
life,

H h 4

What are words
of condition and
what of limita-
tion.
Andr. 263. S. C.
more full.
2 *Eq. Caf. Ab.*
294.
Ferne Conting.
Rem. 401.
2 *Vin. Abr. 102.*
pl. 13.

life, and after her decease to such child as she is now supposed to be *enfeint* of, and to the heirs of such child for ever; provided that if such child as shall happen to be born shall die before twenty-one, having no issue, the reversion of one third shall go to my wife and her heirs, one third to my sister *Elizabeth* and her heirs, and the remaining third to my sister *Anne* and her heirs. And of this will he made his wife executrix, and soon after died, his wife not being *enfeint*. That she assented to the will, and married the father of the lessor who administered to her. And the defendants claim one third under *Anne* the sister of the devisor.

[1093]

After two arguments the Chief Justice delivered the opinion of the court. That though formerly it was doubted, whether a devise to an infant *en ventre sa mere* was good; yet it is now clear, that where it is *per verba de futuro*, it will take effect. *Salk.* 239. *Godolph.* 386. (1). The words therefore would have been sufficient, had any person come in being capable of taking. But the objection is, that no such person ever existed, and consequently those who claim in remainder on the dying of such person under twenty-one, and without issue, can never enjoy the estate.

Now in answer to this, it is observable, that it is no unusual thing for words of condition to be taken as words of limitation, 1 *Vent.* 202. *Salk.* 570. where there is a remainder over (2). Taking it therefore as a limitation, it must either happen, or become impossible. It never did happen; and therefore the question is, whether the limitation over of the term be so remote, as not to be allowed. And we are all of opinion it is not too remote (3).

For this purpose the case of *Massenburg v. Alb* is strong in point, and so is *Martin v. Long*, 2 *Vern.* 151. *Abr. Eq.* 192. And this is agreeable to the case of *Scattergood v. Edge*, where the remainder over on refusing to take the name of *Edge*, was

1 *Vern.* 234,
257, 304.
2 *Chanc. Rep.*
S. C. 275.
Salk. 229.
1 *Eq. Abr.* 189.
pl. 15.
22 *Mod.* 178.
S. C.

(1) *Goodright v. Wright*, *supra* 30. and note 3. and *Chapman v. Bisset*, *Cas. Temp. Talb.* 145, 150. *Doe v. Carleton*, 1 *Wils.* 225. *Harris v. Barnes*, 4 *Burr.* 2157. *Fearne Conting. Rem.* 3 ed. 430.
(2) *Vide Napper v. Saunders*, *Hutt.* 119. *Avelyn v. Ward*, 1 *Feif.* 420. *Lebrieullier v. Tracy*, 3 *Atk.* 774. *Statham v. Bell*, *Cowp.* 40. *Bradford v. Foley*, *Doug.* 63. *Horton v. Wintaker*, 1 *Term Rep.* 346. *Doe v. Shiphard*, *Doug.* 74. *Doe v. Brabant*, 3 *Bro. Chanc. Rep.* 393. 4 *Term Rep.* 706. *S. C.* in *B. R.* *Gough v. Calthorpe*, *ib. notis.*
(3) *Vide Gore v. Gore*, *ant* 958. and the note.

held

held a limitation, and not a condition. The devise to the expected son of *Catharine* is void, as if no such clause in the will, according to *Mo.* 487. And we are the more confirmed in this opinion by my Lord *Harcourt's* decision in the case of *Westcombe v. Jones*, (a) where upon the very clause now in question, he determined that the devise over in thirds was good.

(a) *Proc. Cha.*
316.
1 *Eq. Abr.* 245.
Gilb. Eq. Rep.
74. S. C.

The defendant therefore must have the *posse*, and the plaintiff pay the costs of a nonsuit.

N. B. Mich. 19 Geo. 2. *Gulliver v. Wicket*, the same question was determined with regard to fee-simple lands, and held on a special resolution to be a good remainder in thirds, by the King's Bench, (b) though the Common Pleas had been of another opinion on a case made before *Eyre C. J.* and ruled by *Willes C. J.* and *Parker (c)*.

(b) Reported.
1 *Willf.* 16.
(c) Reported
appendix to
1 *Vesf.* 421.

Andr. Rep. by *Veinon* cited 1 *Willf.* 107. 3 *Burr.* 1624.

Smalley versf. Kerfoot et ux'.

[1094]

TRESPASS against *baron* and *feme* for entering the plaintiff's house, and taking his goods, and converting them to their own use. And after a verdict for the plaintiff, and general damages, it was moved in arrest of judgment, that the *feme* could not convert to her own use; and *Salk.* 114. was cited, where in trover it was held ill.

In usum suum proprium converterunt is not ill in trespass against baron and feme (1).

But upon consideration the Chief Justice delivered the resolution of the court, that this being trespass, it was well enough; for the conversion here is not the *git* of the action, as it is in trover, this action being maintainable for entering the house and taking the goods: and we must take it, the damages were given only for that, as where words are joined that are not actionable, (10 *Co. Osborn's* case) the court intends, they were only added to shew the malice of the party: and it is the same in trover, where part is ill described, we will not intend damages were given for that. *Cro. Jac.* 665.

1 *L. Raym.* 146,
to 290.
1 *Sid.* 319. B.
790.

Agreeable to this is the case in *Salk.* 119. where the wife joined in a battery on her, *per quod* the husband's business remained undone: and in a manuscript report I have seen of that case, *Holt C. J.* says, I will not intend the Judge suffered that to be given in evidence.

(1) *Bellew v. Scot*, ante 440. *Morfoot v. Chevers*, ante 631. *Bull.* 4. N. P. 46.

In the present case therefore the plaintiff must have judgment.

Hall *vers.* Hill et ux' administratr'. At Guildhall.

Wife's owning receipt of money so evidence against the husband.

IN an action for wages earned by the plaintiff's wife of the defendant's intestate, the Chief Justice would not allow the wife's owning the receipt of 20 l. to be given in evidence against the husband (1).

(1) *Vide Williams v. Johnson, ante 504.*

Cole *vers.* Hawkins.

Contempt.
And. 275. S. C.

A Copy of a bill of *Middlesex* was served on the defendant, whilst he was attending the sittings, in a cause wherein he was defendant. And upon motion against the attorney for a contempt, it was contended to be right, because it was not an arrest, which restrained him of his liberty. But the court said, that the privilege was designed as well to prevent any interruption of the business of the court, and it was equally a contempt. And they would have committed the attorney, if he had not consented to waive the proceedings, and pay costs.

[1095]

Dominus Rex *vers.* Frederick and Tracy.

The wife of one defendant against whom material evidence has been given cannot be a witness for the other on an indictment against two.

THE defendants were indicted for a joint assault. And at the trial in *Middlesex*, it was insisted to examine the wife of the defendant *Tracy* as a witness for the other defendant: but there having been material evidence given against the husband and it being a joint trespass, and impossible to separate the case of the two defendants in the account to be given of the transaction; the Chief Justice refused to let her be examined (1).

(1) *Rex v. Inhabitants of Cliviger, 2 Term Rep. 265. B. L. N. 286. Ed. 1790.*

Webb *vers.* Turner.

THE declaration was of *Michaelmas* term, of an assault on the 18th of *October*, and an imprisonment from thence for 25 weeks. And after a verdict for the plaintiff, it was moved in arrest of judgment, that the action was brought too soon, and it appeared damages had been given for an imprisonment long after the action was depending. And 2 *Saund.* 169. *Salk.* 662. 5 *Mod.* 286. *Cro. Jac.* 618. 1 *Vent.* 103. *Hob.* 189. *Carth.* 386. 3 *Lev.* 246. were cited in support of the objection.

What comes under a *feilicet* shall not vitiate. *Andr.* 250. *S. C.* more full. *Ante* 954, 232.

But for the plaintiff it was argued, that the *continuando* in this case was laid under a *feilicet*, and therefore according to *All.* 22. *Hardr.* 4. and *Hob.* 171, 284. it will not vitiate what is properly laid in time: and that this differs from all the cases where the time is affirmatively laid. Besides, it is laid, that he *did* imprison the plaintiff, and therefore respects a time past, and as to that only the evidence could be applied.

And of this opinion was the court, and the plaintiff had judgment.

Rice *vers.* Oatfield.

ERROR of a judgment in *B. R.* in *Ireland* in an ejectment there brought on the demise of *Mary Rice*. Upon Not guilty pleaded, there is a verdict, and judgment for the plaintiff, and a bill of exceptions was sealed, wherein it is stated, that the plaintiff made title under Sir *Stephen Rice*, who was seized in fee, and died a papist in *February* 1715. leaving three popish sons *Edward*, *James*, and *Thomas*: that *Edward* in *January* 1716. renounced the errors of the church of *Rome*, and conformed as by law required, and died in 1720. leaving issue the lessor of the plaintiff. That in opposition to this the defendant gave in evidence, that *Edward* in 1720. devised the premises to one under whom the defendant claimed. To encounter which, the plaintiff insisted that *Edward* died a papist, and consequently was by the law in *Ireland* disabled to devise: and this was offered to be proved by witnesses, which was opposed by

A conviction is not necessary to prevent the devise of lands by a papist in *Ireland* (1). *S. C. Andr.* 232. 235. 12 *Vin. Abr.* 260. pl. 12. [1096]

(1) But now by the *Irish* statutes 17 & 18 *Geo.* 3. c. 49. *l.* 2. & 21 & 22 *Geo.* 3. c. 24. *s.* 1. Lands, &c. of Roman Catholics are made descendible, devisable and transferable in like manner as if they were the property of Protestants.

the defendant, who insisted that the plaintiff should produce some record of the conviction of *Edward*: notwithstanding which the Judges admitted the evidence, and the jury found for the plaintiff.

And now it was argued on the behalf of the defendant, 1. That the plaintiff could not be allowed to contradict his former evidence; or 2. If he could, yet *parol* proof of the apostasy was not sufficient.

To the first of these it was answered, that here is no contradiction; he might conform in 1716. which is all the plaintiff shewed at first, and relapse in 1720. which is the latter proof produced. But if there was any contradiction, it is no objection, for in the case of *Pike v. Badmery* on a trial at bar in B. R. in Lord C. J. Pratt's time, where the three subscribing witnesses to a will were called and denied their hands, the court admitted the plaintiff to contradict that evidence; and he supported the will against such testimony (2).

As to the second point it was answered, that the statutes 2 & 3 *Anna* in *Ireland* do neither of them require a conviction: and it would be absurd if they did, for a man cannot be convicted after his death, and any conviction before cannot prove he is a papist, which is the circumstance inducing the disability: and as this is a mere matter of fact, it may be proved by witnesses as all other facts are.

* 3 Bro. Par.
Ca. 473.

Besides, it was said to be a point determined in the House of Lords here, 2 February 1729. **Ross v. Close*. The appellants claimed as purchasers under Sir George Maxwell: the respondents insisted he was a papist, and could not dispose: in answer to which the appellants insisted he was never convicted: but the court and the Lords were of opinion, that a conviction was necessary, to avoid any voluntary disposition; though to subject a papist to the penalties imposed by the act for a relapse, might.

And upon the authority of this case and the reason of the thing, the court here were all of opinion, that the *parol* evidence was well received; and affirmed the judgment.

(2) *Low v. Jolliffe*, 1 Black. *Alexander v. Clayton*, 4 Black. Rep. 365. *Goodtitle ex dem.* 2224. *Skinn.* 79, 413.

Dominus Rex *vers.* Solgard.

THE defendant being captain of a man of war in commission, and lying within the harbour of *Portsmouth* and the liberties of the borough, had a sailor who hanged himself on board: and the coroner of *Portsmouth*, having impaneled a jury, went to the ship with his jury to view the body; but was refused admittance by the defendant, who offered to send the body to them on shore.

Where a man of war is *infra corpus com'*, the land coroner may go abroad. Andr. 231. S. C. more full.

For this I moved for an information, insisting that as this was not a death *super altum mare*, the land coroner had the jurisdiction; and vouched 4 *Inst.* 141. *Ow.* 122. *Mo.* 892. the statute 4 *E. 1. de officio coronatoris.* *H. P. C.* 171. *Fleta, lib. 1. c. 25.* *Bract.* 121. 33 *H. 8. c. 12.* and *Articuli super chartas*, and 2 *Hale's Hist. P. C.* 16, 54.

On the other side it was insisted for the Admiralty, that they had a coroner of their own; and it might be of ill consequence, to admit so many persons on board a man of war. But the court took notice, they did not pretend their coroner ever took inquisitions, so it was contending that none should be taken. And though there have been variety of opinions as to the Admiralty jurisdiction, yet it was never carried farther than a pretence to a concurrent jurisdiction: and when an officer is ready to do his duty, and is opposed without the duty being done; the public justice is concerned, and there ought to be an information.

Castel and Carter.

UPON error from *Ireland* on a long special verdict in an information in the nature of a *quo warranto*, the constitution appeared to be, that the mayor of *Clonmell* was to be sworn before his predecessor and the free burgesses, or the major part of them: that by the verdict it is stated, that the defendant was chosen *per maximum numerum suffragiorum* of the free burgesses, presented *per majorem partem* of them, and sworn in *presentia quamplurimorum liberorum burgenfium*.

Import of the word *quamplurimi*. And. 120. 344. S. C.

It was agreed, that since *Pender's case* in the House of Lords, the judgment of *ouster* would be good, if the swearing was defective: and therefore I only applied myself to that, and insisted that *quamplurimi* only signified *very many*; and it was the stronger here, when it was opposed to the words *maximum numerum* and *majorem*

Ante 582. 4 Burr. 2139

majorem partem, and it would be dangerous to let them depart from the known expression to denote a majority.

Et per curiam, The proper interpretation of the word is a good many, and this is too loose an expression, to make a title upon against the crown. So the judgment of *ouster* was affirmed.

Dominus Rex vers. Gardner.

The bare keeping a gun is no cause of conviction.
2 Sess. Ca. p.
385. no. 104.
Andr. 259 S. C.
24 Vin. Abr. 3.

THE defendant was convicted by a justice of peace for keeping a gun, contrary to 5 *Ann. c. 14*. And it was objected, that a gun is not mentioned in that statute, and though there are many things for the bare keeping of which a man may be convicted; yet they are only such as can only be used for destruction of the game, whereas a gun is necessary for defence of a house, or for a farmer to shoot crows.

E contra it was said, that a gun is mentioned in 22 & 23 *Car. 2. c. 25*. and considered there as an engine; and the 5 *Ann.* having the general words *other engines*, shall therefore be taken to include a gun.

Sed per curiam, This was made a question in the case of the *King v. King*, *Pasch. 3 Geo.* but never determined. And upon consideration we are of opinion, that a gun differs from nets and dogs, which can only be kept for an ill purpose, and therefore this conviction must be quashed (1).

(1) *Rex v. Filer*, ante 496. 683. [1] *Avery v. Hoole*, *Coar. Wingfield v. Stratford*, *Say. Rep.* 825. *Rex v. Hartley*, *Cald.* 175. 15. 1 *Wilf.* 315. S. C. *Rex v. Thompson*, 2 *Term Rep.* 10. *v. Hunt*, *E. 15 Geo. 3. Doug.*

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Michaelmas Term

12 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

Sir William Chapple, *Knt.*

} *Justices.*

Dudley Ryder, *Esq; Attorney General.*

John Strange, *Esq; Solicitor General.*

Thrustout vers. Troublesome, ex demiss' Parke et ux'.

THE lessors of the plaintiff delivered three ejectments in C. B. and two in B. R. for the same tenements, and made the defendants attend at five assizes, but countermanded in time to save costs: I applied to stay proceedings in the last ejectment, till costs paid of the former, on account of the vexation. But the court would not do it, inasmuch as costs were not demandable by the rules of the court (1).

Costs not demandable for a number of ejectments. *Andr. 297. S. C.* But the point there is, that proceedings upon a subsequent ejectment shall be staid, pending a former one brought in C. B. for the same lands upon the same title.

(1) *Smith v. Barnardiston*, 2 *Black.* 904. *contra, et vide Short v. King*, *ante* 681.

Mytton vers. Cock.

THE plaintiff who was owner of a *carton*, left it in the hands of the defendant, who was an auctioneer, without any particular agreement to take care of it, or re-deliver it safe, and

On a bare leaving a thing in another's custody the law raises a promise not grossly to neglect or abuse it.

[1100]

and without any agreement for a reward. And in a special action upon the case for not re-delivering it safe, but suffering it to be spoiled, it appeared upon the evidence, that the painting was upon paper pasted on canvas, and that it was kept by the defendant in a room next to a stable, in which there was a wall that had made it damp and peel. And upon this evidence it was left to the jury, whether this was a gross neglect. And they found for the plaintiff, 30*l.* damages.

And now upon motion for a new trial, the court agreed, that in this case of a simple *depositum* without a reward the law raises only a promise not grossly to neglect or abuse the deposit: and that therefore it was left properly to the jury, and there ought to be no new trial (1). *Strange pro quer.*

(1) *Vide in Coggs v. Bernard, Gibbon v. Paynton, 4 Burr. 2300. 2 Ld. Raym. 913. In Lane v. Jones on Bailments, 46. 62. &c. Cotton, 1 Ld. Raym. 655. In*

Lockey vers. Dangerfield.

No prohibition
for *You are a*
bawd (1).
Andr. 286. S. C.
27 Vin. 591. n.

Salk. 381.
2 L. Raym.
1197.
S. C. 1702.

70 Mod. 384.
Cited in And.
300.

LIBEL in the spiritual court for these words, "You are a bawd." And upon motion for a prohibition, *Raym. 115. 3 Mod. 74.* were cited, to prove that an action would lie. But the court upon consideration discharged the rule; for it is not a charge of keeping a bawdy-house, which is punishable as a temporal offence. 1 *Roll. Abr. 44. pl. 8.* And an action will lie for those words, but for the word *Bawd* only it will not, that being perhaps no more than a solicitation of chastity. 1 *Sid. 241. 1 Vent. 53, Salk. 552. and Trin. 4 Anna, Regina v. Pearson, who was convicted at Hick's Hall for being a common bawd, and procuring men and women to meet and commit fornication: the court on error reversed it, since it might only be in a private room, and be but a solicitation of chastity, and not amount to the temporal offence of keeping a bawdy-house to the nuisance of the neighbourhood. And the same point as this was determined in B. R. Hil. 3 Geo. 1. Savil v. Kirby.*

(1) *Vide Hodges v. Corbet, ante 545. Carstake v. Mapledram, 2 Term Rep. 473.*

Peyton vers. Burdus.

THE interlocutory judgment was signed in *Trinity term* Practice 1737, and in *August* 1738, a writ of inquiry was executed upon eight days notice; which was set aside as irregular: and held, that where a term's notice of trial is required, there must at the same distance of time be the like notice of executing a writ of inquiry (1).

(1) See *Bogg v. Rose*, *post*. 1164. defendant's assent. *Bosworth v. S. P.* But this is to be understood a voluntary delay on the *Philips*, 2 *Black.* 784. *Walter v. Stewart*, *ib.* 918. *Hayley v. Riley*, *Doug.* 71.

Dominus Rex vers. Haddock.

THE defendant was indicted of a mayhem. And it being laid as usual *felonice*, the question was, whether the defendant must be brought to the bar, or whether his plea might be delivered in the office: and the court held, that there was no occasion of going to the bar, it not being necessary to lay it so now, that life and member is not affected, though the practice has been to draw the indictments in the old form. Practice on indictment of mayhem. [1101]

Clowes vers. Brooke, an Executor.

IN *assumpsit* for a farrier's bill, the defendant pleaded, that the testator was an infant: the plaintiff replied, that the demand was for looking after his horses, and that the work was necessary for the horses. And on demurrer the court held, that the replication was ill; for it should have been only a general replication, that it was necessities for the infant, and left it to evidence, where the circumstances of his health and fortune would be considered (1); and though the work might be necessary for the horses, yet *non constat* the horses were necessary for the infant. *Judicium pro defendente.*

(1) *Vide Huggins v. Wifeman*, of the defendant, kept by him for his necessary use." See 5 *Carth.* 110. According to the report in *Andrews* the replication might have been, "that the physician was for the horses" 644. *Com. Dig. Plaader*, (2 *W.* 22.)

Dominus Rex *vers.* Bryan.

An excuse under
a proviso need
not be taken no-
tice of in a con-
viction (1).
Andr. 289. S. C.
Cited post. 1119.

THE defendant was convicted on the gin act, and an ex-
ception was taken, that there was no averment, that it
was not sold to be used in medicine: and the cases on the game
act were mentioned, where in convictions it is necessary to ex-
clude all the qualifications for killing game.

Ante 608.

1 Keb. 20.
1 Lev. 26.

Strange contra insisted, that the reason of that was because
those were in the enacting clause, whereas this about medicine
comes in by way of proviso, and is by way of defence to be
shewn on the defendant's part. And for that purpose he cited
Mich. 11 Geo. 1. Rex v. Theed; where in a conviction for ob-
structing an excise-officer on 8 *Ann. c. 9.* it was objected, that
it not being averred to be in the day, it should have been shewn
that there was a constable present, which is made necessary in
the night; but held well, and its being in the night, should have
been shewn on defendant's part.

Et per curiam, This is brought within the general enacting
clause: and the true distinction is, where the extenuation comes
in by way of proviso, or exception. The conviction was
confirmed.

(1) *Rex v. Ford*, ante 555.

[1102]

Smith *vers.* Dudley.

Practice, as to
special bail in
counties pala-
tine.

BY 11 & 12 W. 3. c. 9. sheriffs are not to take special bail
in *Wales*, or counties palatine, on process from *Westminster
Hall*, unless a debt of 20*l.* is sworn to. In this case special
bail was taken for 12*l.* upon process into *Lancashire*: and upon
a motion for common bail, it was insisted, that the act 12 Geo.
1. c. 29. about not holding to bail under 10*l.* having only an
exception of *Scotland*, was intended to extend to all other places
and consequently was a virtual repeal of 11 & 12 W. 3. So
per curiam, They are not inconsistent, for 12 Geo. 1. does not
say, you shall have bail for 10*l.* but that you shall not have bail
under 10*l.* whereas in 11 & 12 W. 3. there are negative
words; and the oath here being only to 12*l.* the plaintiff was
not intitled to special bail, and the rule for common bail must
be absolute (1).

(1) *Lord Molineaux v. Charles, Barnes 69. Rayner v. Brough, Barnes 89. S. P. in C. B.*

Dominus Rex *vers.* Armstrong.

AFTER a verdict *pro rege* in an information in nature of a *quo warranto*, the prosecutor gave the usual four day rule in the office, and signed an interlocutory judgment. But before costs taxed, or any final judgment signed, the defendant came to move for a new trial. And the court held, he was too late; for though these motions may be received, even in another term, yet that is upon a supposition, that nothing has been done since the verdict: and so it was held *Trin. 10 Geo. 1. Rex v. Pollard (a)*, and *Mich. 9 Geo. 1. Gilman v. Smith*, where on the plea side the four days rule was out, the court held the defendant was not too late, there being no judgment signed; and that signing judgment was the material act (1), this has made all Attorneys General sign judgment as soon as they can by the rules of the court.

No new trial can be moved for on the crown side after the signing an interlocutory judgment.

(a) Rep. 3 Mod. 264.
2 L. Raym. 1370.
2 Sess. Ca. 10. pl. 17.
See Sel. Cas. Evid. 59.

(1) *Vide Rex v. Gibson, ante* 668. *Rex v. Gough, Dougl. 791.* and see *Rex v. D. Holt, 5 Term Rep. 436.* where it is considered as settled, that the defendant can not of right move for a new trial after the first four days. But that if it appear to the court at any time before judgment that injustice has been done him, they will grant a new trial.

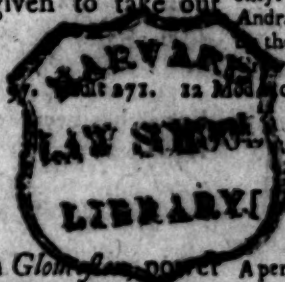
Bertie *vers.* Clutterbuck.

AFTER judgment of a year's standing in *B. R.* the plaintiff sued out a *scire facias*, on which he obtained an award of execution: of this only the defendant brought error in the Exchequer Chamber: and it was held, that 27 *Eliz. c. 8.* does not extend to this case, and leave was given to take out execution.

Error does not lie in the Exchequer Chamber on an award of execution only.

Andr. 287. S. C. the name of *v. Mad-*

dec. 5 Mod. 229. Salk. 263. Comb. 394. 1 L. Raym. 57. 1 Vent. 38. 168. Cro. Jac. 171. Cro. Car. 218.

Dominus Rex *vers.* Miller.

BY a private act for erecting a workhouse in *Gloucestershire*, power is given to the governors, to apprehend any rogues, vagrants, sturdy beggars, or idle and disorderly persons, within the city: the defendant was committed for being a disorderly person: and upon a *habeas corpus* was discharged. For *per curiam*, He must be idle as well as disorderly; being drunk is being

A person must be idle as well as disorderly to be committed for a vagrant.

being disorderly, and yet it was never intended that this act should be put in execution against persons of all ranks under such a circumstance.

Garland, *qui tam*, *vers.* Burton.

No information lies at the assizes for non-residence (1).
Andr. 27. 175.
291. S. C.
6 Vin. Abr. 341.
pl. 18.

AN information was brought at the assizes on 21 Hen. 8. c. 13. against the defendant for non-residence: and the action is thereby given to him that will sue in any of the King's courts by bill, plaint, or information, in which no essoin is to be allowed. And upon demurrer the court held, that it would not lie at the assizes, but must be brought in *B. R.* according to *Cro. Car.* 112. 146. *Het.* 101. *Sir W. Jones* 198. *Hutt.* 98. For 21 Jac. 1. c. 17. never intended to give a new jurisdiction to the assizes in cases where they had it not before. *Vide Salk.* 372, 373. And it was said, that *Farthing, qui tam, v. Markham, Mich.* 13 Geo. 1. (a) was never argued, but the rule was only to shew cause, and never stirred again.

Information not quashable on motion.

N. B. Before any demurrer there was a rule to shew cause why the information should not be quashed, but the court refused to enter into the consideration of it upon such a motion (2).

Mich. 13 Geo. 2. the court made a rule on 18 Eliz. c. 5. for the prosecutor to pay costs, though this was not a judgment on the merits (3).

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- (1) *Leigh v. Kent*, 3 Term Rep. 302. *Bevan v. Williams*, 3 Term Rep. 365. S. P. and see *Balls qui tam v. Atwood*, 1 H. Black. 546.
(2) *Rex v. Jacomb*, ante 953. But it has been held, that an information may be quashed for defect of jurisdiction upon motion. *Rex v. Williams*, 1 Burr. 385. *Rex v. Wesley*, cited *ib.* 389. per Denison J. *Rex v. Holmes*, Andr. 216. seems contra.
(3) See *Hullock on Costs* 203.

Theed *vers.* Lovell. At Guildhall.

Indorsement of note struck out at nisi prius.

WHEN the note was delivered in, the plaintiff's name was upon it. And the Chief Justice permitted it to be struck out in court, it being only an indorsement in blank.

Dominus Rex *vers.* Ellis. At Guildhall.

ON an indictment for perjury in evidence given at the trial of an ejectment, the Chief Justice refused to let any of the defendants in the ejectment, against whom the verdict was given, be examined as witnesses for the prosecutor. And it was said to have been so ruled on conference with all the Judges.

Defendant in ejectment no witness on indictment for perjury.

4 Geo. 1. *Rex v. Newens* (1).

(1) *Vide Rex v. Nunez*, ante 1043. But this case seems over-ruled in *Rex v. Broughton*, post: 1229. and *Abraham v. Bunn*, 4 Burr, 2251. by which it appears established, that a witness shall not be deemed incompetent through interest, unless he either is, or conceives himself liable to gain or lose by the event of the verdict; or unless it may be given in evidence in another action for him. *Vide Carter v. Pearce*, 1 Term Rep. 164. *Bell v. Harwood*, 3 Term Rep. 308. *Bent v. Baker*,

ib. 27. But there seems to be a distinction between an indictment at common law for perjury, and one upon 5 El. c. 9. For by the 14th sect. of that statute, the party injured is in case of conviction intitled to a moiety of the penalty, and therefore seems incompetent, as being an evidence for his immediate interest, in the same way as an informer where he is intitled to part of the penalty. *Rex v. Tilly*, ante 316. *Gilb. Law of Evid.* 3 ed. 127.

Yates *vers.* Boen. In Middlesex.

IN debt upon articles, the defendant pleaded *Non est factum*, and upon the trial offered to give lunacy in evidence. The Chief Justice at first thought it ought not to be admitted, upon the rule in *Beverley's case*, 4 Co. 123. b. that a man shall not stultify himself: but on the authority of *Smith v. Carr*, 5 July 1728, where Chief Baron *Pengelly* in the like case admitted it, and on considering the case of *Thompson v. Leech*, in 2 Vent. 198. the Chief Justice suffered it to be given in evidence. And the plaintiff upon the evidence became nonsuit (1). (2)

Lunacy may be given in evidence on non est factum.

(1) So also excessive drunkenness at the time of signing the deed may be given in evidence upon this issue. *Cole v. Robbins*, Bull. L. N. P. 172. and a woman may give her coverture in evidence. *Cole v. Delaine*, 3 Keb. 228. *Gilb.*

Law of Evid. 165. 3 ed. But that which will only prove the deed to be voidable, as infancy, cannot be taken advantage of upon it. *Vide Gilb. Law of Evid.* 3 ed. 165. Bull. L. N. P. 172. 12 Vin Abr, 181.

113

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(2) In *Smythson on Powell* p. 324 This case is explained thus. That until the case of *Thompson v. Leech* the deed of a lunatic was held voidable only & not void. The Chief Justice decided it to be void, unless the case of a posthumous lunacy, & the Chief Justice said that it might be given in evidence. But it is

At the Council, 9 December 1738.

Present the Two Chief Justices.

*A Mahometan
sworn upon the
Koran.*

*Onicbund v.
Barker, in Canc*

23 February,

13 Geo. 2.

1 Will. 84.

1 Atk. 19. S.C.

ON a complaint of *Jacob Fachina* against *General Sabine*, as governor of *Gibraltar*; *Alderaman Ben Monso*, a Moor was produced as a witness, and sworn upon the *Koran*. I made no objection to it (1).

(1) So also he may be a witness in a prosecution for a capital offence. *John Morgan's case, Leech Cro. Cas. 58.*

Hilary Term

12 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt.* *Chief Justice.*

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.* } *Justices.*

Sir William Chapple, *Knt.*

Dudley Ryder, *Esq;* *Attorney General.*

John Strange, *Esq;* *Solicitor General.*

Smith ex demiss' Dormer *vers.* Parkhurst et al'.

UPON a trial at bar in ejectment, the parties agreed to a special verdict as to a point of law arising upon a family settlement. But there being a question of fact in which they did not agree, that was left to the jury, who found it for the plaintiff against the weight of the evidence.

New trials may be had in ejectment, and after a trial at bar (1). Andrews 315. very full.

The defendant moved for a new trial, and three objections were made. 1. That it was after a trial at bar. 2. That it was in the case of a special verdict. And 3. That it was in ejectment. These points were solemnly argued at the bar, and the court took time to consider of them.

And as to the first, the court held, that in the case of a verdict against evidence, its being a trial at bar was no objection to a

(1) *Vide* Bright v. Eynon, 1 Vez. 28. Doe ex dem. Foster v. Barr. 395. Richards v. Syme, Williams, Cowp. 621.
2 Atk. 319. Baker v. Hart, 1

new trial, which had been granted in the case of *Bewdley*, and in the case of *Sir Christopher Musgrave v. Nevinson*. *Post*. 10 Geo. 1. *ante* 584.

As to the second objection they gave no opinion, it not being necessary to determine it upon the rule they intended to pronounce in this case.

[1106]
Sir T. J. 224.
Salk. 628.
Carth. 507.
Holt 762.

As to the third objection, they strongly inclined, that the verdict not being final in ejectment, a new trial ought not to be granted, but upon very particular circumstances, where justice is no otherwise to be attained. And they observed, that no case had been cited of a new trial in ejectment after a trial at bar.

But the point upon which the new trial in this case was denied was, because they said the evidence was doubtful, and in such a case a verdict at bar ought to stand (2).

(2) *Vide Asbley v. Asbley*, *post*. 1142.

Vaughan *vers*. Browne.

An administration *pendens* *liti* may be pleaded *puis darrein continuance* to justify a retainer (1).
Andrigas. S. C.

THE defendant is sued as executor: and pleads a judgment to himself in the life of the deceased, and a retainer: the plaintiff replies, that he was executor only *de son tort*: and the defendant, by way of plea *puis darrein continuance* rejoins, that he has since obtained letters of administration. And upon demurrer it was objected, that this is to abate the plaintiff's writ, which was well brought, by matter subsequent not depending on any act of the plaintiff's: and that the rejoinder was a departure from the plea. But the court held, it was well enough; for the first plea does not say there was a will, and the defendant could not at that time do otherwise than admit an acting as executor. And they said it would be very hard to lay it down, that if a man who sues for administration is opposed, and the cause runs out into any length, that the acting *pendens liti* should be construed such a wrongful executorship, as can never be purged, so as to give him the benefit of retaining: besides these pleas *puis darrein continuance* begin with a *relicta verificatione* of the former, which shews it may be departed from (2). The defendant had judgment.

(1) *Vide Williamson v. Norwich*,
Sty. 337. 1 Roll. Abr. 923. L.
pl. 12. and *Curtis v. Vernon*, 3
Term Rep. 587.

(2) *Vide Barber v. Palmer*, 1
Ld. Raym. 693. Salk. 178. 12
Mod. 539. S. C. Jenb. 160. case
2. *Stoner v. Gibson*, Hob. 81.
Moore 871.

Marth vers. Yellowly.

IN an action brought by the plaintiff as executor of an attorney, one count was, that the testator in his life was employed by the defendant and did business, but dying in the midst of it the plaintiff caused the same to be finished, and the defendant in consideration thereof undertook to pay. The plaintiff was nonsuit at the trial. And now the defendant moved for costs, upon the authority of the cases, where it has been held, that if the plaintiff might have declared upon a promise made or a wrong done to himself, he shall pay costs, it being a cause of action arising in his own time.

Where an executor shall pay costs on a nonsuit

Andr. 356.
much fuller.
Bulk L. N. P.
332. S. C.
Ante 632.

Et per curiam, (upon consideration) We are all of opinion, [1107] that the plaintiff ought to pay costs. The reason why executors have been excused, arises from the words of 23 H. 8. c. 15. which speaks only of contracts made *with*, or wrongs done *to* the plaintiff: here is a demand for which the executor might undoubtedly maintain an action in his own right: and it falls within the reason of paying costs where an executor declares upon a conversion in his own time (1).

(1) *Vide Cockerill v. Kynaston*, 4 Term Rep. 277. and the various cases cited in *Hullock on Costs* 174, &c.

Archer vers. Snatt.

THE defendant purchased the equity of redemption, and had possession of the estate: the lessor of the plaintiff was a mortgagee, and had also lent money on a bond. And the court being moved to stay proceedings on payment of the mortgage money, with interest and costs; it was referred to the master. And the lessor insisting to be paid the bond, before he would re-convey, the matter was specially reported. And the court was of opinion, that this not being an application by an heir (1), but the mortgagor or his assignee of the equity of redemption; they could not allow the bond debt to be brought in;

Proceedings on a mortgage may be staid by the purchaser of the equity of redemption, without payment of a bond.

Andr. 341. S. C. more full.

(1) That the heir must have paid the debt due by bond as well as that by mortgage. *Vide Shutcliffe v. Laywick*, 1 Vern. 245.

Coleman v. Winch, 1 P. Wms. 776.

Potter v. Corbet, 3 Atk. 556.

Troughton v. Troughton, 1 Vex. 87.

but

but were to act in this case according to the rules of a court of equity, where a redemption is constantly decreed upon payment of the mortgage money only (2). And it was said to have been so held *Hil. 11 Geo. 2. in B. R. Wood ex dimiss' Cowburst v. Mortimer et al'*, and *Eq. Cases 325*.

(2) *Challis v. Casborn*, *Prec.* 244, *videtur contra*; and see also *in Chanc. 407. Coleman v. Winch*, upon this subject *Anon. 2 Vern.* 1 *P. Wms.* 775. *Morret v. Paske*, 177. *Demainbray v. Metcalf*, 2 *Atk.* 53. *Anon. 2 Vez.* 652. *Prec. Chanc.* 419. *Vanderzee v. Bingham v. Gregg*, *Barnes* 182. *Willis*, 3 *Bro. Chan. Ca.* 21. *acc. Banter v. Manning*, 1 *Vern.*

Cafe of the Vicar of Dartford.

Clergymen not obliged to be expeditor of sewers.

Andr. 335. by the name of Chambers's case much fuller.

THE court granted him a writ of privilege against serving the office of *expeditor* to the commissioners of sewers, on the authority of 1 *Mod.* 282. 1 *Vent.* 105. 1 *Lev.* 303. 2 *Keb.* 603. 6 *Mod.* 140. Though it was insisted, that this was an office which might be executed by deputy.

Dominus Rex *vers.* Lord Offulston et al'.

Information granted for taking away a young woman from her guardian and marrying her. *Andr.* 310. *S. C.* much fuller. 24 *Vin. Abr.* 203.

[*1108]

ON a motion for an information, it appeared, that the defendants contrived to get a young lady out of the custody of her guardian assigned in Chancery, and marry her, and that a coach, &c. was prepared, into which she voluntarily went, and was carried into *Suffex*, and there married.

*And the court granted the information; though in 4 *Mod.* 144. it is said not to be an offence at common law: for they said it was certainly a conspiracy (1); and 1 *Sid.* 387. 1 *Lev.* 257. and 2 *Mod.* 130. are in point. Besides, they inclined, that though she went voluntarily, yet it was a taking and conveying of her within the meaning of *sect. 3.* of 4 *Ph. & Mary* c. 8. which puts the case of her consenting, and lays a penalty upon her.

In this case it appeared, the court of Chancery had committed the defendants for a contempt: but the court granted the information notwithstanding, and Mr. Attorney General refused *nolle prosequi*.

(1) *Vide Rex v. Thorp*, *Com.* 26. *Holt* 333. 5 *Mod.* 221. *Com.* 456. *S. C.* *Reg. v. Blacket*, 7 *Mod.* 39.

Jones *vers.* Harris. In Middefex.

IN trespass against six defendants, three suffered judgment to go by default, and the other three pleaded Not guilty: the venire went *tam ad triandum quam ad inquirendum*: and on evidence it appeared, that the trespass was done after the action brought, it being a general *memorandum*. Whereupon the Chief Justice directed the jury to acquit the three defendants, but suffered the plaintiff to go on and assess his damages as to the others.

Though defendants who plead to issue are acquitted, yet damages may be assessed against defaulters. Ante 507. (1).

(1) *Cressy v. Webb & al'*, *post.* 1222. S. P.

Pitts *vers.* Evans. In C. B.

A Prohibition was granted to a suit in the spiritual court by the clerk of *St. Magnus* for 1 s. 4 d. assessed on the defendant's house at a vestry in 1672, to be paid to the parish clerk. For *per curiam*, He is a temporal officer (1): or if not, yet he could not sue there for such a rate; for if it is due by custom he may maintain an *assumpsit*, if not, a *quantum meruit*, or a bill in equity.

Prohibition to suit by a clerk of a parish for fees. 1 Barnes 428. Prac. Reg. 356. But not S. P. 23 Vin. 155. pl. 7.

(1) *Peake v. Bourne*, ante 942.

Easter Term

12 Georgii 2 Regis. In B. R.

Sir William Lee, Knt. Chief Justice.

Sir Francis Page, Knt.

Sir Edmund Probyn, Knt.

Sir William Chapple, Knt.

} *Justices.*

Dudley Ryder, Esq; Attorney General.

John Strange, Esq; Solicitor General.

Croft *vers.* Pawlet.

Though signing in the devisor's presence is not mentioned in the attestation, yet it may be a good execution.

3 Vin. Abr. 128. pl. 4.

2 Eq. Ca. Abr. 765. pl. 18.

ON a trial at bar in ejectment, the defendant made title under a will, the attestation of which was in these words, "Signed, sealed, published and declared as and for his last will, in the presence of us *A. B.* and *C.*" The will was in 1723, and the witnesses all dead, and their hands proved in common form: but then it was objected, that this was not an execution according to the statute of frauds; and the hands of the witnesses could only stand as to the facts they had subscribed to, and signing in the presence of the testator was not one (1). But

(1) *Vide Shires v. Glascock*, Salk. 688. *Longford v. Eyre*, 1 P. Wms. 739. *Dormer v. Thurland*, 2 P. Wms. 510. *Right v. Price*, Doug. 241. *Casson v. Dade*, 1 Bro. Chan. Ca. 59. But it is not necessary that the testator should actually sign his will in the presence of the witnesses. *Lee v. Libb*, 1 Show. 68. *Stonehouse v. Evelyn*, 3 P. Wms. 254. *Gryle v. Gryle*, 2 Atk. 176. *Jones v. Lake*, ib. n. *Grayson v. Atkinson*, 2 Vez. 454. *Carleton v. Griffin*, 1 Burr. 554. *Ellis v. Smith*, Doug. 244. (n.) to 3d. edition.

the court, on the authority of a case in *C. B.* (2) said it was evidence to be left to a jury of a compliance with all circumstances. And a verdict was given for the will.

(2) *Hands v. James*, *Com. Rep.* 530. 2 *Eq. Ca. Abr.* 764. pl. 16.

Dominus Rex vers. Hebden.

ON an information in nature of a *quo warranto* against the defendant as bailiff of *Scarborough*, he made title as elected under the bailiffship of *Batty* and *Armstrong*; and upon issue joined, whether they were bailiffs or not, a record of a judgment of *culter* against them was read in evidence. And upon motion for a new trial, it was held, that it was properly admitted in evidence (1), and was so done lately in a trial at bar relating to the corporation of *Orford* (a). And a new trial was denied.

Evidence.
Andrews 389.
S. C. at large.

[1110]

(a) Vide *Andr.*
391.

(1) It was held admissible but not conclusive evidence. *Andr.* 392. *Bull. L. N. P.* 231. *Rex v. Grimes*, 5 *Burr.* 2601. S. P. But that it is conclusive unless you can impeach the judgment as obtained *per fraudem*. Vide the opinion of Lord *Kenyon* C. J. in *Rex v. The Mayor of York*, 5 *Term Rep.* 72.

Wray vers. Lister

IN debt upon an old judgment, the plaintiff laid the *ad damnum* to 10*l.* the jury gave interest, which came to 30*l.* and for that and costs judgment was entered up. And after error brought, the plaintiff moved to have liberty to remit the *surplus*, and enter judgment for 10*l.* only. And *Page J.* was for doing it; but the Chief Justice and the other two held it could not be done in another term. And the instances of reversing judgments for this fault, shew it was never thought to be amendable (1). *Yelv.* 45.

The plaintiff cannot enter a *remittit* in another term.
Andrews 384.
S. C. much fuller.

(1) *Chevely v. Morris*, S. P. in *B. R.* and in *Cam. Scacc.* 2 *Black.* 1300. A motion had been made in the preceding term to amend the declaration by laying the

damages there in a sum greater than that for which the judgment was entered up, but it was denied. *Andr.* 351.

Dominus Rex *vers.* Inhabitantes de Woolstanton.

One of the justices to allow a binding must appear to be one of the *quorum*.
 Burr. Sett. Ca. 129.
 Bott 145. c. 265.
 Andrews 362.
 371. S. C.

UPON a special order of sessions the question was, whether a boy bound out by justices (the boy being no party to the indenture) had gained a settlement, it being only stated that his binding was allowed and approved by two justices. Now the 43 *Eliz. c. 2.* requires that one of them should be of the *quorum*. And for this omission the court held, that the sessions had done wrong in determining it a settlement, and quashed the order (1).

(1) The point is rightly reported here, but the judgment of the court was, that the order of sessions made for quashing the original order of removal, be *affirmed*. *Vide Burr. S. C. 131.* And see 26 Geo. 2. c. 27. which removes this objection.

Dominus Rex *vers.* Inhabitantes de All Saints in Derby et al.

Variance.
 5 Com. Dig.
 Pleader, (3B.9.)
 902.

(a) Rep. 2 Vin.
 Abr. 375.

A Writ of error was brought of a judgment by the commissioners of *oyer and terminer* for the county of Derby on an indictment for not repairing a highway. And the indictment set forth, that the inhabitants of such part of the three parishes in Derby as the way lies in are bound to repair. The writ of error was of a judgment on an indictment against the inhabitants of the three parishes in general, *ad grave damnum* of them, and for this variance the writ of error was quashed: and *Mich. 3 Geo. 1. Dawson et al v. Lowther* (a) was cited, where in trespass against four, two were convicted, and two acquitted error brought *ad grave damnum* of three, and quashed.

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Trinity Term

12 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

Sir William Chapple, *Knt.*

} *Justices.*

Dudley Ryder, *Esq; Attorney General.*

John Strange, *Esq; Solicitor General.*

Dominus Rex vers. Dr. Bettelworth.

MANDAMUS to grant administration to Mr. Bridgen, the late husband of lady Bellamont deceased. The dean of the Arches returned, that a suit had been commenced before him between Mr. Bridgen and a son of the deceased, who claimed to be her executor under a will made by her pursuant to a deed executed before marriage, whereby the husband agreed she should have power to make a will and dispose of her estate, which deed Mr. Bridgen had confessed, and thereupon sentence had been given for the validity of the disposition, but not for any executorship created thereby; and thereupon a new suit was instituted by the daughter against the son and Mr. Bridgen for administration with the will annexed, which is still depending (2).

Where the husband has departed from all interest in the wife's fortune he shall not have administration. Where a will has been made by a feme covert under a power given her by deed before marriage, a return of a suit pending for administration to a mandamus to grant it to the husband is good. (1)

(1) But it seems something must appear to have been done by the husband to exclude himself. *Vide Rex v. Bettelworth, post. 1118.*

(2) *Rex v. Bettelworth, 2 Barward. 420.*

And

[1112] And upon consideration the court declared, that no peremptory *mandamus* ought to go: for though generally the husband is intitled to the administration as next of kin; yet that is in respect of the interest he has in the estate, and because no body is in *equali gradu*, and that is the reason why administrations are so often granted to a residuary legatee. 2 *Lev.* 56. 1 *Vent.* 219. 1 *Sid.* 281. And though strictly speaking, this is no will, but rather an appointment which is to operate in equity; yet the true question is, whether this is such an intestacy as is within the meaning of the statute. And the law, particularly 29 *Car.* 2. c. 3. considers *femes covert*s as having some right to dispose of their effects, which can only be by the agreement of the husband, which appears in this case: and this differs greatly from the case of *Cullum*, *Hil.* 4 *Geo.* 2. where the power was only as to a leasehold estate, whereas she might have other effects. The matter is properly under the consideration of the spiritual court to whom to grant the administration, and there is no reason for us to interpose, and therefore the return must be allowed.

Ante 891.
Post. 1118.

Dominus Rex vers. Bosworth.

It is a good custom for persons to be admitted to freedom to be obliged to swear on the New Testament (1). It is not unreasonable that the oath should be required to be taken before the admission. In setting out in the return to a *mandamus*, a custom to hold courts for the admission of freemen, the place is sufficiently alleged if it be averred to be held within the city, and the time when need not be set out.

MANDAMUS directed to the chamberlain of London suggesting, that every person of twenty-one years old, born the son of a freeman, and entered of one of the companies, hath a right to be admitted to the freedom of the city; and that *Abraham Rathom* being so intitled, was presented in order to be admitted, but hath been refused; the chamberlain is therefore required to admit him, or shew good cause to the contrary. To this he returns, that the corporation consists of several guilds and fraternities, into one of which persons intitled to freedom are to be admitted; and that there is such a custom as suggested for admitting freemens' sons; and that within the city there is, at this time out of mind has been, a certain ancient court held before the chamberlain or his deputy for the admission of such persons, and that there is another custom for their taking the oath of freeman on the New Testament. Then he admits the title and

(1) But Quakers are exempted by 7 & 8 *W.* 3. c. 34. 8 *Geo.* 1. c. 6. & 22 *Geo.* 2. c. 24. *Vide Rex v. Mayor of Lincoln*, 5 *Mod.* 402. Where a return to a *mandamus* to admit *A.* to the freedom of that city, stating that *A.* was a Quaker, and "refused to take the usual oath according to the

custom of the city," was disallowed, and it is further stated that Quakers are usually admitted to their freedom in London upon their solemn affirmation 12 *Mod.* 190. *Carth.* 448. S. *Vide also Rex v. Turkey Company* 2 *Burr.* 999.

application of *Rathorn* for his freedom; but says that upon tendering him the oath on the New Testament, he refused to take it; that he was not a Quaker, nor had ever since applied to be admitted: *et ea de causa*; he had not admitted him.

This case was three times argued at the bar. And the question about the right of *Jews*, and the nature of their toleration here, was gone into at large. But the court giving no opinion upon that point, it is to little purpose to take notice of it.

And this term the Chief Justice delivered the resolution of the court:

The first objection taken was, that in setting out the custom to hold courts for the admission of freemen, no place or time where and when such court is to be held, is mentioned. Now to this we are all of opinion, the return is sufficient. As to place; it is averred to be held within the city, and that is enough, without saying in what part of the city; for a member of the city must take notice of it, and find it out; and the custom coming to *Blackwell-hall* with cloth was held good in *5 Co.* though the situation of it was not described.

[1113]

And as to time, we think it good upon the same foundation. *Co. 83.* a custom for the tenant to present a feoffment at the court, else it shall be void, was held good, though the time of holding such court did not appear. In many places and corporations they have no stated times of holding courts, but call them occasionally.

The next objection was, that the oath is required to be taken before the admission, and say they, that is unreasonable. But to this we answer, that the giving the oath is the admission itself. And *Pasch. 13 Ann. Regina v. City of London*, it was held for good return, that the party was sworn in: a custom is not to be avoided by a supposition, the officer will not do his duty; the ward may not inroll, or the copyholders present, and yet customs requiring that are good. *5 Co. 84.* Besides, if any further act was necessary after swearing, the party is not without remedy; for he may have a *mandamus*, which is not to be called a modern remedy, for it is founded on the principles of the common law.

The last objection made is, that it is not reasonable to con- sider the oath to the New Testament in trading cities, where a man's religion is of no consequence, and ought not to interfere. The question before us is not whether upon a proper application

L. Raym. 32.

Ante 834.

Ante 1104.

[1114]

cation the *Jews* may not be allowed to swear upon the Old Testament, as they do when they give evidence; but whether this custom of taking an oath in the usual manner is unreasonable upon the face of it. My Lord Coke in 3 *Inst.* 165. defines an oath to be, an affirmation or denial by any Christian, and the law takes no notice of dissenting from an establishment. My Lord Chief Justice Holt in *Larwood's* case says, there has always been an established religion, the ridiculing of which is punishable; and that also was the opinion in *Woolston's* case, *Pasch.* 3 Geo. 2. In 1 *Vent.* 293. Hale says, it is part of the law of the land; and in a manuscript of his which I have seen, he says that Christianity came in here by external spiritual force, and discipline, was introduced as a custom, and is part of the law.

It was said, that the law does not require the New Testament in all cases, particularly as to evidence given by *Jews*. But the reason of that is, because all courts desire to have the best security they can for the truth of the evidence; and therefore as it is known they have a more solemn obligation to speak the truth when sworn on the Old Testament, it is for that reason allowed. The common regular way of swearing is on the New Testament and shall we say that a custom requiring such a regular oath is bad? The 1 *Eliz. c. 1. § 19.* takes notice of an oath upon the Evangelists, and the abjuration oath (till altered for the *Jews* by 10 Geo. 1. c. 10. § 18.) runs, upon the true faith of Christian.

We therefore think this a good return, and allow it.

Case of the Parish of Saint Peter and Paul in Marlborough.

Justices may order one parish to pay a sum in gross to another, but then they must make the rate by which it is to be raised.

2 Sess. Ca. p. 324. No. 186. S. C.

TWO justices reciting the inability of the parish of *Saint Mary the Virgin* to maintain its own poor, order the church-wardens and overseers of *Saint Peter and Paul* to assess, raise and levy 60*l.* for the maintenance of the poor of the other parish. And objection being made to their ordering such a gross sum, the court held it well in that respect, according to 1 *Vent.* 350. *Salk.* 480. *Cumb.* 309. (1). But then the order was quashed, because the justices had delegated their power of assessing and rating the parishioners to the churchwardens and overseers; whereas by the 43 *Eliz. c. 2.* the justices are to make the rate on all, or particular persons.

(1) *Rex v. Holbeche*, 4 Term Rep. 778. *Nol. Rep.* 121. *Ref. acc.*

Olive *vers* Ingram.

IN *assumpsit* for money had and received to the plaintiff's use, a case was made at *nisi prius* for the opinion of the court.

A woman is capable of being a sexton and of voting in the election.
13. Vin. Abr.
159. pl. 7.

That there being a vacancy in the office of sexton of the parish of *Saint Botolph without Aldersgate*, in the city of London, the plaintiff and *Sarah Bly* were candidates: that *Bly* had 169 indisputable votes, and forty which were given by women who were house-keepers, and paid to church and poor; that the plaintiff had 174 indisputable votes, and 22 other votes given by such women as aforesaid; that *Bly* was declared duly elected: upon which the plaintiff brought a *mandamus* and was sworn in, and the defendant had received 5 s. belonging to the office.

In this case two points were made: 1. Whether a woman was capable of being chosen sexton. And, 2. Whether women could vote in the election.

As to the first, the court seemed to have no difficulty about it, nor did I think proper to argue it, there having been many cases where offices of greater consequence have been held by women, and there being many women sextons now in London: the authorities cited upon this point were *Spelman's Gloss.* 497. *Mich. 2 Ann.* a woman appointed governor of *Chelmsford* workhouse: *Lady Broughton's* case, who was keeper of the Gatehouse. *3 Keb.* 32. *Blunt's Tenures* 47. *4 Inst.* 221, 215. *Dy.* 285. *Hob.* 148. And in *Brady's History of Boroughs*, it appears that my *Lady Packington* was the returning officer for members at *Aylesbury*.

[1115]

2 L. Raym.
1014.
Vide 2 Term
Rep. 595.

As to the second point *4 Inst.* 5. was cited to shew women could not vote for members of Parliament or coroners, and yet they have freeholds and contribute to all publick charges, and even to the wages of knights of the shire, which by the *Register* 192. a. are to be levied *de communitate comitatus*. And though they vote in the monied companies, yet that is by virtue of the acts which give the right to all persons possessed of so much stock: that military tenures never descended to them. *Wright's Tenures* 28. *West's Inquiry into the manner of creating Peers* 44.

But the court notwithstanding held, that this being an office that did not concern the publick, or the care and inspection of the morals of the parishioners; there was no reason to exclude women, who paid rates, from the privilege of voting: they observed, here was no usage of excluding them stated, which perhaps

haps might have altered the case: and that as this case was stated, the plaintiff did not appear to have been duly elected; and therefore there ought to be judgment against him.

Dominus Rex vers. Inhabitantes de East-Bridgford.

Apprentice's
settlement.
Burr. Sett. Ca.
133. and Sess.
Ed. 1752. vol. 2.
p. 215. No. 151.
S. C.
Ante 10. 1001.
Vide also *Caiffier*
v. Eccles. L.
Raym. 683.
Salk. 68.

UPON a special order it was stated that an apprentice upon the death of his master, was with his own consent turned over by the widow (who had taken no administration) to another master, whom he served. And the court held it a good settlement in the last parish, within the reason of the case of *Holy Trinity and Shoreditch, Mich. 3 Geo. 1.* where *A.* was bound to *B.* but served *C.* all the while in another parish, and there gained a settlement.

[1116]

Between the Parishes of Saint Neots and Saint Cleer.

A settlement is
gained by living
on his own
estate, and re-
mains after the
estate is sold.
Burr. Sett. Ca.
132. and Sess.
Ca. Ed. 1750.
vol. 1. p. 400.
No. 318. S. C.

UPON appeal from an order of removal from *Saint Neots* to *Saint Cleer*, the case was stated, that the *pauper* was born in *Saint Cleer*; that he lived a year as a hired servant at *Saint Neots*, and then returned to *Saint Cleer*, and lived with his mother on a tenement, in part whereof he had an estate of inheritance, of which he was seised in common with his mother and sisters; that he afterwards sold his right; and that he had never lived upon it forty days together. And it was insisted on, that though whilst he had the estate he was not removable; yet it was but a temporary settlement. And the settlement gained at *Saint Neots* by service would revive. But the court held, that he had gained a subsequent settlement at *Saint Cleer* by living forty days upon that estate, and the selling it afterwards made no alteration.

Sir Alexander Anstruther's Case.

After one coun-
ty sessions has
determined an
insolvent
debtor's case; he
cannot remove
and hear his case
in another
county.

HE being a prisoner for debt in the *King's Bench* prison in *Southwark*, applied to the quarter sessions for *Surrey* to be discharged upon the insolvent debtors act; but being opposed by a 500*l.* creditor, he was ordered to continue in custody, and the creditor to pay him one penny per week; and at a subsequent sessions it was refused to increase the allowance.

Upon this he removed by *habeas corpus* to the *Fleet*, and applied to the sessions in *London*; where he was allowed to the extent of the act, 3*s.* 6*d.* per week. And for non-payment there-
of

of he was at a subsequent sessions absolutely discharged. And all these orders being removed by *certiorari*, the court was of opinion, that the *London* orders ought to be quashed: for he was the proper subject of the *Surrey* jurisdiction at the time of making their orders. And it is like the case of a second removal of a *pauper*, where it appears there is a former order in force, and no variation of the circumstances and merits of the case: besides, if all the orders stand, the creditor is made to pay more, than the Parliament has appointed by one penny. Wherefore the *London* orders were quashed.

Heath *vers.* Walker. In Middlesex.

[1117]

UPON looking into the record there was no issue joined, for it was *et prad'* the defendant, instead of the plaintiff, *smiliter* (1): it was therefore objected, that the Chief Justice had no commission to try any issue. And the doubt was, what to do, for the jury had been sworn. And upon advising with the bar, the Chief Justice dismissed the jury, for he could not call the plaintiff, or suffer the defendant to take a verdict.

If it appears no issue is joined, the jury must be dismissed.

Ante 267.

(1) That this would have been and the note. See also *Cooper v. amendable after verdict. Vide Spencer, ante 641. and Sayer v. Rawbone v. Hickman, ante 551. Peacock, Cowp. 407.*

Michaelmas Term

13 Georgii 2 Regis. In B. R.

Sir William Lee, Knt. Chief Justice.

Sir Francis Page, Knt.

Sir Edmund Probyn, Knt.

Sir William Chapple, Knt.

} *Justices.*

Dudley Ryder, Esq; Attorney General.

John Strange, Esq; Solicitor General.

Dominus Rex vers. Bettsworth.

Though the wife has a separate estate at her disposal, and makes a will; yet if there be no assent of the husband, he shall have administration.

Ante 891. 1111.

TO a *mandamus* to grant administration to the husband, it was returned, that the wife's mother having by her will given her several effects for her separate use exclusive of the husband, and to be by her disposed of as she should think fit, she had accordingly made a will, whereby she devised her separate estate to trustees, with whom the husband was now litigating the validity thereof in the ecclesiastical court, pending which suit the dean of the Arches could not grant administration. *Et per curiam*, This is an insufficient return, for here is no act of the husband's to express his assent to her making a will; and she may have *choses* in action, or other rights, besides what are included in her mother's will: in these cases there must be some act done by the husband, to exclude himself; which not being pretended in this case, there must be a peremptory *mandamus*.

Green *vers.* Giffard.

THE cause was tried upon a day to which it was continued by a second countermand. And the defendant making no defence, the verdict was set aside, it being only in the plaintiff's power to continue his notice once in a term. And Page J. said, it was so settled in C. J. Holt's time on examining the attornies (1).

Practice.
Vide Impey's
Prac. K. B. 315.

(1) In *Boyes v. Twist*, Barnes 292. acc. in C. B.

Dominus Rex *vers.* Calcutt et Monk.

THERE were five several convictions for deer-stealing returned, four of which being either for killing, or aiding in killing deer, in *Waltham* forest, had no objections made to them that are worth taking notice of; but as to the fifth, which was for deer-stealing in a *purlieu* of the forest, it was objected,

Deer-stealers.
Vide 16 Geo. 3.
c. 39.

That it was not averred, that deer were usually kept in the *purlieu*, but only that they were usually kept in the forest, whereas by 3 W. & M. c. 10. that seems to be required. The clause is, "If any person shall unlawfully course, &c. any red or fallow deer in any forest, chase, *purlieu*, paddock, wood, park, or other ground inclosed, where deer have or shall be usually kept, without the consent of the owner, or person chiefly intrusted with the custody thereof, or shall be aiding or assisting therein, and shall be convicted thereof, he shall forfeit, &c." To this it was answered by Mr. Solicitor General, That such averment could not extend to a *purlieu*, for 4 Inst. 303. describes it as a place where by law deer cannot be kept, it being disafforested as well with regard to all others as the owner, and the oath of the ranger, 304. is to drive deer out of the *purlieu* into the forest. *Manwood* 292. Secondly, The averment as to forests, chases, and *purlieus*, is not made necessary by the act, for the words *where deer are usually kept* extend only to ground inclosed; else the words *other ground* will make it necessary to aver that the forest, &c. was inclosed, which is not the case in any part of *England*.

3 W. & M. c. 10.

Trem. Ent. 329.
No such averment as to a park.

Et per curiam, The answer is right in both respects.

Another objection was, that it did not appear, but that the defendant was owner of the *purlieu*; in which case he had a right to chase the deer off his ground. *Sed per curiam*, That would be master of defence, and should be shewn on his part, according to the resolution in the case of the *King v. Bryan*, (*ante* 1101.) so the convictions were confirmed.

Hickman *vers.* Colley.

What costs are to be paid when the defendant makes a suggestion for costs. Andr. 377. S. C.

BY 3 Jac. 1. c. 15. it is provided, That if one citizen of London sue another out of the jurisdiction, and does not recover 40 s. he shall not only lose his own costs, but shall also pay to the defendant so much ordinary costs, as such defendant shall justly prove it hath cost him in defence of the suit.

Ante 46. 974.

In this case the verdict was for less than 40 s. and the court gave the defendant leave to suggest it on the record, as the only way to get at his costs (1). And a suggestion being made, and a demurrer put in to it, which was adjudg'd for the defendant; it came to be a question, whether the costs of the application should be allowed, or only costs of the trial and former proceedings, this not being strictly speaking costs of the defence. But the court ordered the costs of the whole to be taxed.

(1) *Vide Wilson v. Donnelly, Say. Rep.* 273. *Fitzpatrick v. Pickering, 2 Wils.* 68. *Wase v. Wyburd, Dougl.* 246. and the cases there cited. S. P. where the action was brought against an inhabitant of Middlesex. But if the defendant lives within the jurisdiction of the Westminster courts, he must plead 23 Geo. 2. c. 27. in bar. *Taylor v. Blair, 3 Term Rep.* 452.

Doe on the Demise of the Dutchess of Hamilton *versus* Robinson et al^s.

When to plead to the jurisdiction in ejectment.

DECLARATIONS in ejectment were delivered before the esoin day of Easter term, and in Trinity term the defendants appeared, and moved for leave to plead to the jurisdiction, that the lands lay in the county palatine of Chester. And upon shewing cause, I objected that they came too late. *Sed per curiam*, Though in ordinary cases the defendant must plead this within the first four days; yet we all know that in a country cause the tenants cannot be compelled to appear till four days after Trinity term. As therefore they have come in voluntarily before they could be obliged, it is hard to say they are out of time. And the rule for pleading to the jurisdiction was made absolute.

Dominus Rex *vers.* Crofts.

CONVICTION on 9 G. 2. c. 23. for selling gin. It was objected by Serjeant *Boote*, that it appeared the defendant was a *feme covert*, and therefore as she could make no contract, it must be taken to be her husband's sale; or if she could be convicted, he ought to have been joined for conformity. And 2 *Keb.* 468, 479, 634. 1 *Sid.* 410. were cited.

Mr. Solicitor *contra* said, that where the crime is of such a nature, as can be committed by her alone, she may be indicted without her husband; which being a proceeding grounded merely on the breach of the law, he shall not be included unless privy. *H. P. C.* 65. 1 *Hawk.* 3, 147. 6 *Mod.* 213, 239. In this case there may be imprisonment and whipping.

Et per curiam, We think the conviction is right; for this is not like the cases that sound only in damages: the wife may be convicted alone for recusancy. *Hob.* 96. 11 *Co.* *Forster's* case. And though she cannot have the benefit of the contract, yet she as well as a servant may do the act of vending. *Salk.* 384. *Cro. Jac.* 482. Besides there would be a plain way to evade the act, if *feme coverts* could not be convicted (1).

(1) "*Ellen Taylor's* case, "*bastard child had before marriage.*
"Pasch. 5 Geo. 3. B. R. a married "*The commitment on return to an*
"woman was committed to the house "*habeas corpus was held good."* MSS.
"of correction for not performing S. C. 3 *Burr.* 1679.
"an order, for maintenance of a

Gainsborough, Executor of Gainsborough, *vers.* Follyard.

THE defendant was indebted by bond to the testator of the plaintiff, who died 13 *March* 1738. Upon making up all accounts the defendant on 3d *April* 1739. executed a warrant of attorney to confess judgment at the suit of the executor as of last *Hilary* term, or any subsequent term, and 7 *April* the judgment was entered up, and the defendant's goods taken in execution. After this a commission of bankruptcy issued against him. And now the assignees moved to set aside the judgment, as being entered of *Hilary* term, when the testator was living. And the court held it to be irregular, for the attorney could have no authority to appear in *Hilary* term at the suit of the executor: and the judgment must be considered as of that term, though to other purposes the day of signing is material. So the judgment and execution were set aside.

Judgment at the suit of executor set aside because by relation it was in testator's life-time.
 24 *Vin. Abr.*
 617. pl. 3. S. C.

Brittain *vers.* Greenville.

THE defendant in ejectment obtained a trial at bar, on consenting to pay bar costs, and receive *nisi prius* costs. After this the lessor was admitted *in forma pauperis*, and had a
 Vol. II. * K k 5 verdict

Pauper.
 16 *Vin. Abr.*
 262. pl. 15. &
 C.

verdict against him. And now having brought a new ejectment, it was moved that the master might tax costs, in order to ground a further motion to stay his proceedings in the second ejectment. But the court refused to make any rule, saying every man had a right to a second trial before ejectments were introduced, and might bring a writ of right after a verdict in assise. And they could not construe the rule as a consent on his part to pay costs in all events, but only as terms put upon the defendant. That the regular way when a *pauper* is vexatious, was to dispauper him (1); but they could not think he was so in the present case.

[1122]

(1) *Taylor v. Lowe*, ante 983. acc. and see *Noaks v. Watts*, ante 420.

Dominus Rex vers. Watkinson.

At Nisi prius in Middlesex.

Attorney present at putting in an answer cannot be obliged to swear.

UPON an indictment for perjury in an answer in Chancery, the master who took it was called, but could not speak to the identity of the person. Upon which the prosecutor insisted to examine the defendant's solicitor, who was present at putting in the answer, and had been subpoenaed; but he insisting on his privilege, the Chief Justice would not compel him to be sworn: so the defendant was acquitted. *Quære tamen*, for this was to a fact in his own knowledge, and no matter of secrecy committed to him by his client (1).

(1) *Vide* the opinion of Lord Mansfield in *Doe v. Andrews*, *Coamp.* 846. *Lord Say and Seale's case*, *Bull. L. N. P.* 284. *Cobden v. Kenrick*, 4 *Term Rep.* 432. agreeing with the reporter's objection, and that proof of the master's hand-writing, together with that of the defendant subscribed to the answer, is *prima facie* sufficient evidence of his identity. *Vide Rex v. J. Morris*, 2 *Burr.* 1189.

Fowles vers. Sir John Dinely. At Nisi Prius in Middlesex.

Where the husband shall not be charged for necessaries for the wife.

Gilb. L. E. 183.

THE defendant's wife having been convicted of a conspiracy to charge her husband with subornation of perjury was committed in execution for a year. The plaintiff kept a spunging-house, within the rules, and received the defendant's wife in to his house, and found her necessaries, for which this action was brought. The Chief Justice ruled, that it would

not lie; for her being there was illegal, she being such a prisoner as was not intitled to the benefit of the rules (1), and in such case the law will not raise an implied promise, to charge the husband (2).

(1) Case of *Landen Jones*, ante 817. (2) *Vide Bolton v. Prentice*, post. 1214.

Jordan vers. Lewis. At Guildhall.

THE plaintiff and another were indicted at the *Old Bailey* Evidence, for forgery, and acquitted, and a copy of the indictment granted to the other only. In this action, which was for a malicious prosecution, the plaintiff offered the copy in evidence; and the order at the *Old Bailey* was read by way of objection. But the Chief Justice said, he could not refuse to let the plaintiff read it, for an order was not necessary to make it evidence, nor is it ever produced in order to introduce it. So it was read, and a verdict obtained for the plaintiff, which the court refused to set aside.

Hilary Term

13 Georgii 2 Regis. In B. R.

Sir William Lee, Knt. Chief Justice.

Sir Francis Page, Knt.

Sir Edmund Probyn, Knt.

Sir William Chapple, Knt.

} *Justices,*

Dudley Ryder, Esq; Attorney General.

John Strange, Esq; Solicitor General.

Dominus Rex vers. Sparrow et al',

Overseers may
be appointed at
any time in the
year.

2 Sess. Ca. p.
184. No. 140.
2 Bott by Const
17. pl. 33.
3 Burn's Just.
320. S. C.

A *Mandamus* issued *teste* 1 *June*, directed to the justice of *Ipswich*, to appoint overseers of the poor: to which returned, that they had in obedience to such writ made an appointment: and that being removed by *certiorari*, appeared bear date 13 *June*.

It was objected by Mr. Solicitor General, in order to quash the *mandamus* and appointment, that it appeared the month of *Easter* (which is a time given by the statute to make the appointment in) was expired before the writ issued, *Easter* day being 22 *April*: and the court was bound to take notice of that according to *Salk.* 626. and *Hoyle v. Lord Cornwallis*, *Trin.* 61. ante 387. The act designed the justices should do it within a limited time, and therefore puts it in *Easter* week, or within one month after *Easter*: now if it may be done at any time, it will introduce great confusion, and it will be many years before it comes round to the right time again. There can be no inconvenience in this, because the churchwardens are ordered to take care of the poor, and there is a penalty upon the

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tices, which goes to their use. This is a part of the act, which was never yet thought to be directory only.

The court upon the argument (except *Page J.*) inclined to think the *mandamus* and appointment were wrong; but upon further consideration, they all held the appointment good, and confirmed that, and allowed the return, the Chief Justice delivering the following resolution:

The court must judicially take notice, that this is made without the month: but then the question is, whether it is void or not? The adding a penalty is an argument it is not so, for it was foreseen there would be inconveniences if it was not done in time, and it might therefore be proper to enforce a speedy execution of the power: and this was the construction as to taking pledges on *Westm. 2. c. 2. 2 Roll. Abr. 259.* Though it is a new law, yet against the justice and meaning of it no negative shall be implied. *Magna Charta* says, *Communia placita non sequantur curiam nostram*; and yet if the Common Pleas gives judgment to abate the plaintiff's writ, which is reversed in the King's bench, that court shall proceed upon the writ. *2 Inst. 23.* So also as to an assize in the proper county, *2 Inst. 25.* The statute *2 E. 6. c. 4.* requires two or more justices; and yet *3 Inst. 136.* it is held, that where there is but one justice, he may execute the authority.

Ante 387.

The *43 Eliz. c. 2.* being for the maintenance of the poor, must be construed liberally, and so said *Pratt C. J. Trin. 7 Geo. 1.* in the case of *Rufford*, where a *mandamus* to appoint overseers in an extraparochial place was granted after the month was expired; and so it was *Trin. 5 Geo. 2.* in the case of *Uttoxeter*: and though these were cases on *13 & 14 Car. 2. c. 12.* yet they must derive their authority from the former law. Here are no negative words; as in *12 Car. 2. c. 25. § 13.* as to the price of wines, where the words *and at no other time* are added.

Ante 512.

Ante 932.

It is considerable, that this is a thing which it is not in the power of the parish to procure, and is therefore a construction *ex necessitate* (1).

(1) *Rex v. Stubbs, 2 Term Rep. 395. S. P.*

Hafwell qui tam, vers. Chalie.

IN debt on *12 Car. 2. c. 25.* for selling wine by retail without licence, the jury found a special verdict to this effect; and the defendant was a merchant who imported wine in pipes and

An importer of wine in pipes and hogheads sells to three persons at several times

dozen of quart bottles thereof unmeasured, which were carried away by them and drank in their own houses, that is a selling by retail within *12 Car. 2. c. 25.* and *15 Car. 2. c. 14.* *Andrews 392.* more full. It was also argued that this was an offence within *7 E. 6. c. 5. f. 8.* *Andr. 393.* The verdict must find that the quantity sold is retail measure.

VOL. II.

* K k 7

hogheads,

[3125]

hidgheads, swearing it did not belong either to vinther or retailer; that he sold to three different persons at three different times one dozen of quart bottles of *Oporto* wine unmeasured by any measure, refusing to sell by the gallon; and that this wine was drawn out of a pipe by him imported, and was carried away by the buyers, and drank in their private families, and not elsewhere; and that the defendant had no licence. And after two arguments, the court was unanimously of opinion, that this was retailing within the meaning of the statutes 12 Car. 2. c. 25. and 13 Car. 2. c. 14. *Minsbul's Dictionary*, verbo *Retail*. So judgment was given for the plaintiff.

5 March 1740, this judgment was reversed in the House of Lords, the dozen of quart bottles not being found to be a retail measure (1) and a *venire facias de novo* awarded (2).

(1) "In an opinion given by Mr. Henley afterwards Lord Chancellor in 1743, speaking of this case he says he could not help suspecting there were some other reasons for that judgment than those appearing on the face of the proceedings, and I have been informed that no objection was made in Westminster Hall to the verdicts being imper-
fect and that the judgment of the House of Lords seemed to be formed upon the unreasonableness of determining the point." MSS.
(2) *Kynaston v. Mayor of Shrewsbury*, ante 1053. and the note.

Coulson *vers.* Coulson.

What words pass an estate-tail. 2 Atk. 246, 247. 2 Eq. Ab. 318. a 34. S. C.

A Case was sent from the *Rolls*, wherein the question was, whether an estate-tail, or only an estate for life, passed by a will: and it was this.

Robert Bromley devises to his grandson Robert Coulson and his assigns for his life natural, the reversion of lands expectant on death of the devisor's sister, and from and after the determination of the estate for life of his said grandson, then to trustees during the life of his grandson to preserve contingent remainders, and from and after the death of his grandson, unto the heirs of his body lawfully begotten and to be begotten, with divers remainders over.

And upon the first argument the court was clear in opinion that this was an estate-tail in the grandson (1). The cases cited

(1) The certificate of the court was, "that by reason of the remainder interposing between the devise to Robert for life, and the subsequent limitation to the heirs of his body, the said Robert took an estate for life, not merged by the devise to the heirs of his body, but by that devise an estate tail in

remainder vested in the said Robert." 2 Atk. 250. *Vide Farnham v. Farnham*, C. R. 4th ed. 338.

"So the case as above reported by Strange is not law, and material differs in this respect that the wife of Robert would not have been drawn in." MSS.

to prove it an estate-tail were 1 *Co. Shelley's case* (2). *Co. Litt.* 22 b. 319. b. *Cro. Eliz.* 525. 1 *Vent.* 214. *Trin.* 11 *Ann.* rot. 220. *Backhouse v. Wells*, *Abr. Ca. Eq.* 184. *Mich.* 13 *Geo.* 1. *Goodright v. Pullen*, ante 729. And a case at the Council Board of *Wood v. Morris* (a).

(a) Cited 2 *Burr.*

1102.

2 *Atk.* 249.

Fearne C. Rem.

4 ed. 247.

E contra were cited *Carter* 170. 1 *Sid.* 81. *Salk.* 568. 224. 3 *Lev.* 437. *Garth.* 72. *Abr. Eq. Cas.* 105. 390. 1 *Vent.* 231 (3).

(2) The rule in *Shelley's case*, here cited, is laid down in these terms, 1 *Rep.* 104. a. "where the ancestor by copy, gift, or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, that always in such cases (the heirs) are words of limitation of the estate, and not words of purchase."

(3) Lord *Hardwicke* is stated not to have been satisfied with the opinion expressed in this certificate, per Lord *Mansfield* in *Doe v. Laming*, 2 *Burr.* 1109. and in *Hodgson v. Ambrose*, *Doug.* 326. In this last case however the judges of *B. R.* certified, "that whatever their opinions might have been if the case were new, they thought that as the case of *Coulson v. Coulson* was literally the same, the precise question ought not to be agitated again." But Mr. Justice *Buller* defended the present certificate, upon the ground that the testator having made use of legal phrases only, the court were bound to understand them in a legal sense.

In *Bagshaw v. Spencer*, 1 *Vex.* 142. 3 *Atk.* 246. 570. 577. where *A.* devised lands to five trustees, their heirs, &c. in trust by rents, sale, or mortgage, to pay debts, &c. and after payment thereof to three of the trustees and their executors for 500 years,

to pay legacies and a life annuity, and after the determination of that estate, he devised the premises to all the trustees, in trust to the use of *T.* his nephew, for life", &c. (with the same limitations as in the subsequent devise to *B.* upon whose interest the question arose) "and for want of such issue, to the use of his nephew *B.* for the term of his natural life, without impeachment of waste, and after the determination of that estate, to the same trustees during the life of *B.* to preserve contingent remainders, and after his decease, then to the use of the heirs of the body of *B.*" with like remainders over. Lord *Hardwicke* was of opinion that *B.* took only an equitable estate for life, and distinguished that case from the present, as being the devise of a trust in equity, whereas this was of a mere legal estate. But the authority of this decision, except perhaps for a devise literally the same, has been considerably shaken by *Garth v. Baldwin*, 2 *Ves.* 646. *Wright v. Pearson*, *Fearne C. R.* 4th ed. 187. *Amb.* 358. *S. C.* and *Jones v. Morgan*, 1 *Bro. Chan. Cas.* 206. This distinction between the construction of a limitation of a legal estate, and that of a trust executed is also held to be of no validity in *Austin v. Taylor*, *Amb.* 376. *Doe v. Laming*, 2 *Burr.* 1108. and per *Bulla*

Butler J. in *Hodgson v. Ambrose*, Dougl. 329. The cases which resemble the present one most by reason of the existence of a devise to trustees to support contingent remainders, are beside those already cited, *Papillon v. Voice*, 2 P. Wms. 471. *Sayer v. Masterman*, *Fearne C.R.* 4th ed. 249. *Amb. 344.* S.C. *Perrin v. Blake*, 4 Burr. 2579. 1 Black. Rep. 672. *Fearne C.R.* 4th ed. 239. S.C. *Thong v. Bedford*, 1 Bro. Chan. Ca. 317. In some of these cases, the devisees took a legal, and in others an equitable estate, but the invalidity of this distinction we have seen already. In others a distinction has been taken between such trusts as are deemed executed, and such as are considered as executory. Where devisees have been adjudged of the latter kind, as in *White v. White*, *Amb.* 670. Courts of equity have inclined as in the case of marriage articles, to consider a subsequent limitation to "heirs of the body," as giving an estate to such heir by purchase. Lord *Glenorby v. Bosville*, *Cas. temp. Talb.* 3. *Roberts v. Dixwell*, 1 Atk. 601. *Baskerville v. Baskerville*, 2 Atk. 281. *Dobson v. Hay*, 3 Bro. Chan. Ca. 404. *Bastard v. Proby*, 2 P. Wms. Cox's edition 478. note. The solidity of this distinction however has been questioned by Lord Mansfield in *Doe v. Laming*, 2 Burr. 1108. and by Lord Hardwicke in *Bagshaw v. Spencer*, 1 Vex. 152. But in *Bastard v. Proby*, cited *supra*, Lord *Knyon C. J.* then Master of the Rolls, is represented to have said, (upon the authority of Lord *Northington*, in *Loyd v. Jones*,) that Lord Hardwicke did at last admit a difference between them. The application of the rule in *Skelley's* case is most ably treated of in *Harg. Law of Wills* 351. Mr. *Butler's* note 1 *Harg.* and *Butl. Co.*

Litt. 376. b. and in the late and justly to be lamented Mr. *Fearne's* profound and perspicuous treatise on *Contingent Remainders*, 4 ed. p. 163 to 319. The result of these gentlemen's opinions, which are sanctioned by the authority of Lord C. *Thurlow*, in *Jones v. Morgan et supra*, seems to be, that where the intention of the testator is manifestly clear to give an estate for life to the first taker, and that the second should take by purchase, such intention must prevail notwithstanding the devisee has described the person who is to take after the devisee for life, by the words "heirs of his body," &c. But wherever it is evident that the testator intended that the whole line of heirs to the first taker, who answer to the description in his will, should succeed to him as such, there the first taker cannot have an estate for life, but must take one either in tail or in fee, "because all heirs claiming as heirs must take by descent, which is the same thing as saying that the ancestor who is the stirps or terminus, must have the inheritance. If therefore an estate to the ancestor for life, and to his heirs as heirs by purchase, is inconsistent with the rules of law, it can no more be devised by a will than a fee simple in the same lands to A. every Monday, and B. every Tuesday, or a fee be limited upon a fee. Taking it for granted then that the intention to include the whole line of heirs, (whether general or special) to the tenant for life in the devise is manifest, any clause in the will giving the first taker a lesser estate than one of inheritance, or willing that the estate given to him should have the properties of an estate for life only, must be rejected as repugnant to the chief object in the mind of the testator.

The

The seeds of this criterion by which the application of the rule to wills is to be determined, may perhaps be traced to the difference taken in many of the cases as to whether the word "heir," or the word "issue," is used by the testator as *nomen collectivum*, or merely as a *designatio personæ*. Vide *Clarke v. Day*, Cro. Eliz. 313. *King v. Melling*, 1 Vent. 232. *Luddington v. Kime*, 1 Ld. Raym. 205. *Backhouse v. Wells*, 1 Eq. Abr. 184. *Shaw v. Weigh*, ante 804. The reason for the original introduction of this rule is stated by Lord Mansfield in *Doe v. Laming*, 4 Burr. 1106. to be in favour of the lord to prevent his being deprived of the fruits of the tenure, and for the sake of specialty creditors; and his lordship adds, that the reason of the maxim having ceased with the abolition of tenures, that although from having become a rule of property, it is adhered to in all cases literally within it, yet where there are circumstances which take the case out of the letter of the rule, it is departed from in favour of the intention. The various cases cited *supra*, in which the application of this rule has been discussed, subsequent to *Doe v. Laming*, shew that the judges have not concurred in his lordship's opinion to its full extent. Whatever attempts have been made to reconcile and render consistent the application of the rule with the intention of the testator, it can scarcely be denied that such intention is in general violated by its adoption, even where the deviser does not add words of restriction to his express donation of an estate for life. We cannot help therefore looking upon this as an anomalous class of cases, being the only one in which the form of expression does not yield to the intention of the testator to limit his estate in a

manner in other respects consistent with the rules of law. Unlettered men, knowing that they can give an estate for life to the ancestor, and one of inheritance by purchase to all his issue in successive remainders, are unacquainted with those formal distinctions used in transmitting property which in truth are now nothing more than differences of expression. The reasons for creating them in conveyances originally founded in the interests of society, having ceased, they are now only known to those who have traced our law through the various modes it has been forced to have recourse to, in order to accommodate itself to the acts of the legislature, and the alteration of human events. To the rest of mankind it must remain unaccountable, and therefore be often unattended to, that a manifest design to give an estate for life to the first taker, will be frustrated by the use of the word *heirs*, &c. in the subsequent limitation of the property to his children, while it would have taken effect by the use of the words "first and every other son, &c." But as it is clearly held that the intention of the testator is the fundamental principle in the construction of testamentary dispositions to which every other form of expression must and does yield, and to support which, words are often supplied or rejected, it will not I hope be thought too bold an assertion to make, That if this rule of construction had not been transferred from deeds to wills before the reason for its original adoption had entirely ceased, courts of judicature would not now apply it thus to interpret the dispositions of the unlearned part of mankind, in a manner which the numberless litigations upon the point prove to be repugnant to their sense. If judges were

unfettered by numerous prior determinations, they might perhaps deem it a slighter violation of the words of a will, and a stricter compliance with the intention of the testator, *where other circumstances do not concur to vary the construction*, to give the devise for life its full effect, and to construe the word "heirs" in all cases as they have done, in that of a devise of an executory trust, and as they do the word "issue." That is to consider it as tantamount to a first and every other son and their heirs, and so on according to the various words of limitation that may be superadded in the devise. Lord Hardwicke and Lord Mansfield seem to have proceeded on reasons something like these when they disapproved of the decision in the present case, and attempted to lay the rule aside in *Bagshaw v. Spencer*, and *Perrin v. Blake*, where the technical modifications of the devise gave them an apparent latitude to depart

from established judgments. But opinions which these great men have found themselves unable to shake by the strength of their reasoning and reverence to their authority, must now be considered as unalterably fixed, we may therefore conclude that the law is finally settled, and refer to those two discriminating lines pointed out by Mr. Fearn, which, when they concur, the rule *must*, and when they do not, the rule cannot apply. "The one is, that the person to claim the inheritance *after the ancestor* is to claim as heir, &c. that is, *eo nomine*, and under *that description*, whoever such person may be; and the other, that the effect of the limitation is not confined to the person so *first* claiming, or his representatives *as such* of any description; but directed equally through *all other persons* successively answering the same relative description of *heirship* general or special to the ancestor referred to, and entitling them *eo nomine*, or in that character only."

[1126] The Case of Henry Waldron, a Clerk in the Crown-Office.

Clerk of the crown-office may have a rule for the original alien to pay him.

INGRAM an attorney (since deceased) employed him in several *quo warranto* causes in the borough of *Evesham*, which were prosecuted and defended by Sir *John Rusbout* and Mr. *Rudge*, who were *Ingram's* clients, and bills were delivered by *Ingram* to them, in which were included the clerk in court's demand amounting to 292 l. 6 s. since which *Ingram* is dead insolvent, and his executors insist to receive the whole of Sir *John Rusbout* and Mr. *Rudge*, and leave the clerk in court to come in as a creditor. Upon this I moved, that Sir *John Rusbout* and Mr. *Rudge* (who admitted to have above 600 l. in their hands of *Ingram's* bill) might pay the clerk in court his share, as is done every day in Chancery; and the gentlemen submitted to do as the court should direct. *Et per curiam*, There is no reason why we should not take the same care of our clerks: the money paid to *Waldron* will not be assets that have come to the hands of the executors, so they cannot be prejudiced. A rule was made for their paying to Mr. *Waldron* 292 l. 6 s. which was his proportion of the bill (1).

(1) *Rex v. Smollet*, 3 Burr. 1113. S. P.

Hooker *vers*: Wilks.

DEBT on 8 Geo. 1. c. 19. for the penalty of 30*l*. by using a hound to destroy game. And after a verdict for the plaintiff, the judgment was arrested, for 5 Ann. c. 14. has not the word *hound*, and the words *other engines* come after nets, &c. and are applicable only to inanimate things. And this being a penal law, cannot be extended. The statute 22 & 23 Car. 2. c. 25. has indeed general words, *or any other dogs to destroy game*, but this is not a conviction on that statute (1).

2 Geo. 1. c. 19.
Hound not with-
in 5 Ann. c. 14.
Cald. 177.

(1) *Vide Reason v. Lisle*, Com. Rep. 576.

The Rector, &c. of Saint George Hanover Square *vers*:
Steuart.

THE parish was cited to appear in the Bishop of London's court, to shew cause why a licence should not be granted to Mr. *Steuart*, to erect a charity-school on part of the church-yard. And upon motion of the rector and parishioners a prohibition was granted, for the ecclesiastical court has nothing to do with this, and cannot compel them without their consent.

Prohibition to a
suit for building
charity-school in
church-yard.
1 Burn's Eccl.
L. 371.

Dominus Rex *vers*: Munoz.

[1127]

HE was convicted for procuring from one *Mary Kingsford* by false tokens a promissory note, under pretence that he would bring her money for it. And upon motion in arrest of judgment, it was held, that it is necessary in an indictment, to specify the false tokens. 2 Cro. 20. 4 Co. 40. H. P. C. 265. 1 Lev. 299. So the judgment was arrested (1).

The false tokens
must be specified
in an indictment

(1) 2 Hawk. P. C. ch. 25. sect. 57. 320. 4 Com. Dig. Indictment,
(G. 3.) 394.

Case of the Level of Hull.

Sewers.

AN order of sewers was made for levying 9 *d.* per acre on 1312 acres, to be paid to the clerk, to be applied towards defraying of charges in and about the execution of the commission. And though it was objected, that this should have been on the occupiers, according to 10 Co. 143. *a.* yet the court held this good, for the words of the statute do not require it (1). Another objection was, that a rate cannot be made to reimburse charges, any more than to re-imburse overseers of the poor. *Sed per curiam*, In this case there is an express power to allow charges, whereas in that the 43 Eliz. c. 2. confines the power to rates for relief of the poor; and a rate after the poor have had it is not strictly so called. The order was confirmed.

(1) *Vide Commissioners of Sewers* pl. 54. *Bow v. Smith*, 9 Mod. 827. 94, 95.

Between the Parishes of Southwold and Yoxford in Suffolk.

Poor.

Bur. Set. Ca.
140. S. C. 2 Sess.
Ca. p. 371. no.
198. S. C.

UPON a special order of sessions it was stated, that the pauper took a house at Southwold at the rent of 10 *l.* per annum, the landlord agreeing to build a stable, washhouse, &c. to it. That the real value when taken was but 6 *l.* 10 *s.* per annum, and the landlord never made the new erections; but if they had been made, it would have been worth 10 *l.* per annum. And the court held this no settlement (1).

(1) *Vide Rex v. Western*, Burr. S. C. 166.

Russell *vers.* I. eme. At Guildhall.

What is proof of
buying goods
beyond sea.

TO prove a property in the cargo on an action upon a policy of insurance, the plaintiff produced a bill of parcels of one Gardiner at Petersburg with his receipt to it, and proved his hand. The defendant objected, that this was no evidence against the insurers; but the Chief Justice allowed it.

Easter Term

13 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

Sir William Chapple, *Knt.*

} *Justices.*

Dudley Ryder, *Esq; Attorney General.*

John Strange, *Esq; Solicitor General.*

Fitchet *vers.* Adams.

IN ejectment on the demise of *Richard Hayes*, the jury found a special verdict to this effect: that *Richard Hayes* (since deceased) being seised in fee of the premises in question, and having a wife *Margaret*, and a daughter *Elizabeth* of the age of six years, by his will dated 16th *May* 1722, devised to his wife and her heirs, but if she marries again, then he appoints two trustees to receive the rents, and apply them to the education of his daughter till she comes of age, and in case of such marriage of the mother he devises to the daughter in fee. That *Richard* died in *June* 1722, and the wife entered and married a second husband 15 *April* 1723, and the daughter continued to live with and was educated by her till her (the daughter's) death 5 *May* 1734, when she died without issue and unmarried; and the father of the plaintiff was her cousin and heir. That 22 *May* 1738, *John Wood* on behalf of the lessor of the plaintiff did, without any previous authority, make an actual entry on the premises, claiming the same as the estate of the lessor in virtue

An entry by a stranger without authority is good to take advantage of a condition, if it be assented to afterwards.

Easter Term 13 Geo. 2.

of his heirship to *Elizabeth*, and that the lessor having notice thereof did 5 *June* 1738, assent thereto.

Upon this case two points were made: 1. Whether an actual entry was necessary. And, 2. If it was, whether this was a sufficient one.

[1129] The first of these depended on two questions, 1. Whether this devise over was a condition or a limitation; for if it was the latter, an actual entry undoubtedly was not necessary; 2. That if it was a condition, then whether it would be necessary; this not being to avoid a fine (1).

These were spoken to at the bar, but the court gave no opinion upon them; being very clear upon the second point, that what was found, did amount to an actual entry, to support an ejectment, being assented to before the day of the demise in the declaration. *Co. Litt.* 247. 258. 9 *Co.* 106. 1 *Roll. Abr.* 738. *pl.* 2, 3, 4. And they also held, that there was no occasion for its being by deed or in writing. Judgment was given for the plaintiff.

3 Com. Dig.
Claim (b. 2.)
64.

(1) *Vide Berrington v. Parkhurst, ante* 1086.

Warren, ex demiss' Webb *vers.* Greenville.

A surrender of
tenant for life
shall be presumed
on a recovery
of forty years
standing.

UPON a trial at bar, the lessor of the plaintiff claimed under an old intail in a family settlement, by which part of the estate appeared to be in jointure to a widow at the time her son suffered a common recovery, which was in 1699. And the defendants not being able to shew a surrender of the mother's estate for life, it was insisted that there was no tenant to the *precipe* for that part, and the remainder under which the lessor claimed was not barred.

To obviate this it was insisted by the defendant, that at this distance of time a surrender should be presumed; according to 1 *Vent.* 257 (a), and what is laid down in Mr. Piges's book of *Common Recoveries* (b); and to fortify this presumption they offered to produce the debt book of Mr. Edwards an attorney at *Bristol* long since deceased, where he charges 32 *l.* for suffering the recovery, two articles of which are, for drawing a surrender of the mother 20 *s.* and for ingrossing two parts thereof 20 *s.* more, and that it appeared by the book the bill was paid.

(a) 3 *Reb.* 310,
1 *Mod.* 117, S.C.
(b) *P.* 41.

And

And this being objected to as improper evidence, the court was of opinion to allow it, for it was a circumstance material upon the inquiry into the reasonableness of presuming a surrender, and could not be suspected to be done for this purpose; that if *Edwards* was living he might undoubtedly be examined to it, and this was now the next best evidence. And it was accordingly read (1). After which the court declared, that without

As only in an
book read after
his death.

(1) Entries in private books or memorials are only admissible as evidence to affect the rights of third persons, upon proof that the writer is dead, and that they are in his hand-writing. *Dutcheffs of Marlborough v. Guidot*, cited 2 *Vez.* 193. In *Lefebure v. Worden*, *ib.* 55. with this restriction they seem ADMISSIBLE in four cases. First, Where the party charges himself by that entry with the receipt of money. *Smartle v. Williams*, cited by Lord Hardwicke in *Montgomerie v. Turner*, Bull. L. N. P. 283. Comb. 249. S. C. *Anon.* 1 *Ld. Raym.* 145. *Anon.* 12 *Vin. Abr.* 90. pl. 13. *Barry v. Bebbington*, 4 *Term Rep.* 514. *Stead v. Heaton*, *ib.* 669. *Searle v. Lord Barrymore*, ante 826. and according to this last case, an entry made by the person himself from whom the plaintiff derives his interest as his representative, is admissible evidence for him, if it be proved to have been made at a time when it would have charged the writer. Vide the opinion of Lord Hardwicke in *Glyn v. The Bank of England*, 2 *Vez.* 43. But it must be such an acknowledgment as will either render the writer responsible for the sum to another person, or will render him an acquittal for so much of one who appears to have been the debtor, for the entry does not derive its authority from the importance, that a man shall confess a debt, or writing what he owes to his

own disadvantage. Vide *Outram v. Morewood*, 5 *Term Rep.* 123. Secondly, Where hearsay evidence of the writer's declarations, respecting the same fact would be admissible in evidence after his death, As to prove a pedigree, &c. *Lill. Prac. Reg.* 552. *Zouch v. Waters*, 12 *Vin. Abr.* (T. b. 87.) pl. 5. p. 90. *Woodnoth v. Lord Cobham*, *Bunb.* 180. et vide the instances mentioned in *Glyn v. The Bank of England*, 2 *Vez.* 40. *Davis v. Pearce*, 2 *Term Rep.* 53. *Outram v. Morewood*, 5 *Term Rep.* 123. Thirdly, In the case of ecclesiastical dues, entries in the parson's books have been received as evidence for his successor. Per Lord Hardwicke in *Glyn v. The Bank of England*, 2 *Vez.* 43. *Anon.* *Bunb.* 46. But this is considered as an anomalous case per Lord Kenyon, C. J. *Outram v. Morewood*, 5 *Term Rep.* 123. Fourthly, In the case of shopkeepers' books; these when in the hand-writing of servants used to make entries therein, have upon proof of such book keeper's death and hand-writing been admitted in evidence for the tradesman. But entries in his own hand are not so, 2 *Vez.* 43. It seems formerly to have been the opinion that these books were in themselves evidence for the tender, unaccompanied by any circumstances vouching their authenticity, and that they were taken that for payment was made to reduce their obligation to a year from the date of

creditor's death

without this circumstance they would have presumed a surren^der; and desired it might be taken notice of, that they did not require any evidence to fortify the presumption, after such a length of time (2).

the entry. *Per* Lord Hardwicke, who cites the authority of *Lord Raymond*, 2 *Vez.* 43. In *Pitman v. Madox*, *Salk.* 690. they seem to have been so admitted. But in subsequent cases the judges have required that it should be proved by some circumstances attending the manner in which the books were kept, and the entries made therein, that they are not fabricated to support the cause in which they are to be produced; and according to the strength or weakness of these corroborating circumstances, they have been allowed or refused to be laid before the jury. *Vide* *Lord Torrington's case*, *Salk.* 285. *Evans v. Lake*, *Bull. L. N. P.* 282. 2 *Vez.* 43. *S. C.* where they were admitted; and this last case has been said by Lord Hardwicke to go a great way, 2 *Vez.* 43. *ib.* 55. and see *Clerk v. Bedford*, *Bull. L. N. P.* 282. where they were rejected.

(2) In *Goodtitle v. Duke of Chandos*, 2 *Burr.* 1072. Lord Mansfield speaking of this case, in which he was of counsel, says, that the court relied upon the positive proof of the surrender by

the entry, and did not mean to say that they required no evidence to fortify the presumption arising from such a length of time; "but that they would not require positive proof in a case where there was a sufficient presumption." But in p. 1075. he states *from his own notes*, that the court did say in this case, that after a recovery of 40 years standing they would without any other circumstances presume a conditional surrender. In the case of *Goodtitle v. Duke of Chandos*, the possession not having gone with the recovery, *B. R.* would not presume a surrender by the tenant for life. *Wilmot J.* was of opinion, *ib.* p. 1075. that length of time alone is nothing: the presumption must arise from facts or circumstances arising within that time. And by Lord Mansfield, "Possession of the tenant in tail after the death of the tenant for life, does leave a ground of presumption that there was a surrender," *Ibid.* 1076. See also *Keen v. Earl of Effingham*, *post.* 1267. and the opinion of *Comyns C. B.* 4 *Com. Dig. Title Evidence*, (A. 4.)

[1130]

Goater *versus* Nunnely.

Rule made for a plaintiff to produce his books.

THE dispute was between the plaintiff a factor in *Smithfield*, and the defendant a grazier: and upon the defendant's motion the court made a rule for the plaintiff to shew cause, why he should not produce at the trial the several books wherein he enters the accounts of beasts sold and of monies received on the defendant's account. The plaintiff shewed no cause, so upon an affidavit of service the rule was made absolute (1).

(1) *Vide* *Gracewood v. ——— The Fraternity of Hostmen in Newcastle*, 439. *Sed vide* *Ward v. Apprie*, 6 *M. d.* 264. and *Rex v.*

Dominus Rex *vers.* Ford.

THE court was moved for an information against a churchwarden, for refusing to collect money on a brief for fire, according to the act 4 Ann. c. 14. and the case of informations granted for not burying in woollen was cited. *Sed per curiam*, That is of a public nature, and wherein the revenue is concerned: and besides, in this case there is a penalty given, and a method for obtaining it. So no rule was made.

No information for not collecting brief money.

Smith *vers.* Clarke et al'.

THE plaintiff declared in trespass for entering his house, continuing there forty-eight hours, disturbing him in his possession, and eating and consuming twenty pound of beef, specifying also several quantities of mutton, veal, lamb, beer and ale. The jury found for the plaintiff, and half a guinea damages. And the question was, whether the plaintiff should have full costs; which upon consideration were awarded him; for as to the goods it is in the nature of an action of trover, and here is to all purposes an asportation, which always carries costs.

Where the plaintiff shall have full costs.

Rivers and Lite.

UPON error *e C. B.* it was held actionable to say of the plaintiff, *You did shut up my sister* (meaning Anne the late wife of the plaintiff and sister of the defendant) *and murder her, and I will prove it*; notwithstanding a long string of old cases were cited to the contrary (1). And the judgment was affirmed.

Words.
1 Vin. Abr. 507.
pl. 41.

(1) *Com. Dig. Action upon the case for defamation.* (D. 2.) 250. (F. 2.) 266.

Shepley *vers.* Marsh.

[1131]

THE plaintiff declared on a bond dated 6 January 1728. The defendant pleaded *non est factum*, and in the issue delivered, the bond was described as in 1738, and the issue was received, and paid for without any objection. The record of *nisi prius* was 1728, and no defence being made, the court was now moved to set it aside, as varying from the issue delivered.

If the record of *nisi prius* agrees with the declaration delivered, a variation in the issue delivered is not material (1).

(1) *Vide Thompson v. Simson, Barnes 475. Leeman v. Allen, 2 Wilj. 160.*

But

But the court refused to set aside the verdict, for the defendant's plea upon record was not altered by it; the issue tried being, whether he executed a bond in 1728. Besides, he should have refused the issue, if not agreeable to the declaration,

Dominus Rex vers. Woodfall.

Costs on informations.
4 & 5 W. & M.
c. 18.

UPON trial of an information for a libel, the jury acquitted the defendant contrary to the direction of the court. Upon which the defendant moved above for costs on 4 & 5 W. & M. c. 18. which provides, that in cases where the defendant is acquitted, the court is authorised to award costs to the defendant; unless the Judge shall at the trial certify there was a reasonable cause. In this case no such certificate was asked; but it was insisted on for the prosecutor, that it was discretionary in the court. The Chief Justice certified *ore tenus*, that it was a verdict against evidence; but then he and all the others held, that it was now too late to inquire into the probable cause; and that it was not discretionary, but compulsory upon them, where there was no certificate (1). So the defendant had his costs.

(1) *Rex v. Davis*, adj. *Mich.* 10 *Anne.* 2 *Hawk. P. C.* cb. 26. f. 12. 7 ed. vol. 4. p. 92.

Between the Parishes of Hasfield and Furley in Gloucestershire.

A child cannot be with the grandmother for nurture, and a boy with her cannot be removed if he has an estate in the parish. *Burr. Sett. Ca.* 147. S. C.

UPON a special order of sessions relating to the settlement of a boy of eight years and a girl of six, who had been removed by two justices from *Furley* to *Hasfield*, it was stated, that the mother of these children had an estate of 4 *l. per annum* in *Furley*, where she and her husband lived and had these children; that she dying, the husband became tenant by the curtesy, and whilst such he took 30 *l. per annum* in *Hasfield*, and lived one year there with his two children, and then died: that the children being found with their grandmother at *Furley*, were both removed to *Hasfield*: which order the sessions confirmed.

And now the court upon argument confirmed the orders as to the girl, but quashed them as to the boy. For as to the boy he
was

was tenant in fee of the 4 *l.* per annum. And though it was not stated, that he was actually upon that spot; yet it was enough, that he had such an estate in the parish, from which he could not be removed. But as to the daughter it was otherwise, she could demand no maintenance out of her brother's estate: and it was never yet determined, that children should go to a grandmother for nurture. She may indeed be charged to contribute to their relief in the parish where they are settled.

Blakey *vers.* Birmingham.

THE judgment was, that the plaintiff *should* recover, instead of *do* recover. And after error, the court amended it as the misprision of the clerk (1).

Amendment.
Post. 1156, 1182.

(1) *Foster v. Blackwell*, C. B. Barnes 7. *acc. et vide Waldock v. Cooper*, 2 *Wils.* 16.

Between the Parishes of Ovingdon and Northoram in
Yorkshire.

UPON the settlement of an apprentice, it was stated, that the mother proposed to put him out to an inhabitant of Northoram, who refused to take him, because he wanted cloaths; upon which the grandfather agreed, that he would pay 30 *s.* to the master to cloath the boy withall: in pursuance of which the master did lay out 30 *s.* in cloaths for him, and he was bound by indenture, in which no mention is made of the 30 *s.* nor was any duty paid. That the grandfather paid the 30 *s.* and the apprentice served out his time, which the sessions adjudge to be a settlement. *Et per curiam*, The order was confirmed: for this is not like the case of *Curenden v. Laland*, where there was money actually given to the master, for his own use; whereas here the master is a mere agent of the grandfather's to lay out 30 *s.* for him. And it could make no difference, whether the master did it or any body else. That this was not a case within the intent of 8 *Ann. c. 9. § 39.* the positive words of which, in a case expressly within it, obliged the court in the other case to hold it no settlement (1).

Money advanced for cloaths need not pay the apprentice duty.
8 *Ann. c. 9. § 39.*
Burr. Sett. Ca. 145. and *Seff. Ca. Ed.* 1750. vol. 2. p. 196. no. 144. S. C.

Ante 903.

(1) *Rex v. Leighton*, 4 *Term* Vide also *Rex v. Portsea*, *Burr. Rep.* 732. *Nol. Rep.* 100. S. P. S. C. 834.

Trinity Term

* 13 & 14. See
Burr. Sett. Cas.
150. pl. 50. n.
30 2d ed.

* 13 Georgii 2 Regis. In B. R.

Sir William Lee, Knt. Chief Justice.

Sir Francis Page, Knt.

Sir Edmund Probyn, Knt.

Sir William Chapple, Knt.

} *Justices.*

Sir Dudley Ryder, Knt. Attorney General,

Sir John Strange, Knt. Solicitor General.

Adams vers. Rush.

Prohibition to
settling church-
wardens ac-
counts. Ante
974. 17 Vin.
Abr. 600. n.

PER curiam, The spiritual court has no jurisdiction to settle a churchwarden's accounts. And a prohibition was granted after sentence allowing the accounts, and an appeal to the Archb.

Dominus Rex vers. Westbeer.

The stealing a
commission to
settle boundaries
is not felony.
Where the facts
stated upon a
special verdict
upon an indict-
ment for felony
do not amount to
felony, but are
a great misde-
meanor, judg-
ment cannot be
given as for a
trespass. 2 Sess.
Ca. p. 378. no.
202. S. C.

UPON a *certiorari pro rege* to the Old Bailey, an indictment for larceny, and a special verdict thereupon, were returned into the King's Bench. The indictment set forth, that the prisoner feloniously stole a parchment writing purporting to be a commission 10 Ann. out of the court of Chancery, to settle the boundaries between two manors, and ascertain the height which the defendant in the cause had a right to keep water up to, in a pond in his ground; and also another parchment writing purporting to be a return of the commissioners thereto: which commission and return were respectively laid to be of the value of 2 s. and were of the goods and chattels of the King. Upon

Not

Not guilty pleaded, the jury find that two parchment writings answering the description in the indictment in the year 1712, were brought into the fix clerks office in *Middlesex*, belonging to the court of Chancery, and the proper office wherein to record and keep them, as records of that court, where they were accordingly kept till 28 October 1738, when the prisoner privately carried the same out of the office with an intent to steal the same: that they were the King's goods, and each of the value of one penny; and that in 1717, the cause was at an end. *Sed utrum, &c. et si, &c.*

This case was twice argued at the bar, 1. By Mr. Solicitor General for the crown, and Serjeant *Hayward* for the prisoner; and 2. By Mr. Attorney General and Mr. *Barnardiston*.

On the part of the crown it was argued, that upon the whole record the prisoner was guilty of *petit larceny*. In order to prove this, two things were insisted on, 1. That this was *petit larceny*, according to the general nature of it. And 2. That no objection lies from the nature of the parchment writing, or its being a record, to bring this taking away to be under the degree of felony.

As to the first, it was observed, that there was no difference in the description of the offence (except in point of value) between grand and *petit larceny*, but both are considered as two species of simple larceny. That the definitions of simple larceny to be met with in all the ancient writers do not materially differ. *Bracton*, lib. 3. c. 32. p. 150. b. defines it to be *fraudulenta contractatio rei alienæ cum animo furandi, invito domino cujus res illa fuerit*. *Britton*, c. 15. p. 22. uses the words *de ceux a qui les choses serrent, ou par ceux hors de qui garde le chose avera este trouve emble ou robbe*. And with these descriptions agrees *Fleta*, lib. 1. c. 38. p. 54. In 3 *Inst.* 107. it is styled, the taking away the mere personal goods of another: and in *Bro. Corone* 190. the felonious taking of any thing wherein another hath property.

Now as to the first part of the description, *fraudulenta contractatio animo furandi*, it is found that the prisoner privately (which answers to *invito domino*) carried the same out of the office with an intent to steal the same. That it was *res aliena* is expressly found, the verdict being, that it was the property of the King; and a value is found, which reduces it to *petit larceny*. Here the property is found as a fact, and cannot be said to be a false conclusion of the jury, for the crown has the records in their custody. And in 3 *Inst.* 71. it is called the King's treasury of judgments, with which agrees *H. P. C.* 650. Though the
parchment

parchment be originally paid for by the party; yet when once made a record, he cannot take it away. And so it is as to the rolls of the lord of the manor. The *animus furandi* is the substance, and no nice distinctions as to the property should be received. *Parochiani* are no corporation, and yet the stealing *bona parochianorum* is indictable. *Dalt.* 373. *Stamf.* 25. b.

But then the objection arises, that though this may *prima facie* fall within the general description of larceny; yet the nature of this parchment writing, or its being a record, furnishes an exception out of the general rule, and proves this not to be such a thing, of which a felony can be committed.

In order to obviate this objection, it will be necessary to examine a little the grounds upon which it stands. How slender a reason forever there was at first for the distinction, yet it must be agreed to be now too late to contend, that as to *choses en action*, or what belongs to the realty, a felony can be committed of them; and the reason given in 1 *Hawk.* is, that these things generally speaking being of no use to any but the owner, are not supposed to be so much in danger of being stolen, and therefore need not be provided for in so strict a manner, as those which are of a known price and every body's money. So that if I steal a skin of parchment worth 1 s. it is felony; but when it has 10,000 l. added to its value by what is written upon it; it is no offence to take it away.

The use to be made of this observation is, that so far as the law is settled, it is not to be altered: but if it does not exempt this particular case, there is no reason to exclude it.

Now what are exempted? 1. Chattels real. Is this one? No. 2. *Choses en action*, which this is not. 3. Charters concerning the inheritance. In those the heir has a property, and they go to him, and he may bring detinue for them. But these records he has no right to the custody of, nor will such an action lie for them.

The case from whence all the law books have received the notion upon which the defence is founded, is 10 E. 4. 14. by which case it is determined, that felony cannot be of charters which concern the realty, which says the book *cannot be valued*. But that reason does not hold here. It is well known that taylor, drum-makers, &c. do buy these things: and besides, the jury have expressly found them to be of value. Would stealing an heir loom not be felony? Certainly it would, and yet that favours of the realty.

The

The next part of the objection is, that these were records, and this not being laid as a case upon the statute 8 H. 6. c. 12. cannot be now maintained as a felony at common law. It must be agreed, this is not a case within that statute, as wanting one circumstance thereby required, *viz.* whereby any judgment shall be reversed. But then another use is made of this statute, to shew that stealing records was no felony at common law, else say they, what need was there of the statute? Now it is apprehended, no such inference can be well drawn from thence. The words are, "That if any record, &c. shall be willingly "stolen, taken away, withdrawn, or avoided, by any clerk or "other person, who shall be duly convicted by inquest of clerks "of the court, they shall be adjudged felons." From whence and my lord *Coke's* comment upon it, 3 *Inst.* 71. it appears, there was a plain use for this statute; for where clerks were intrusted with the custody, they had thereby such a possession, that they could not commit felony by embezzling them; and it was therefore necessary to provide for this by a positive law, as also to introduce a new method of trial. And it is observable, that my lord *Hale*, 1 *H. P. C.* 646. treating of this statute, after dividing his argument into how the law stood *before* the act, and how *after*, says nothing of the act of stealing by a mere stranger; but begins with saying, that at common law the undue rasure or embezzling a record was a great offence, for which even a Judge was punishable by fine and imprisonment, as in Judge *Hengham's* case in the time of *Edward* the First. Wherefore it was prayed on behalf of the crown that the prisoner might be adjudged guilty of *petit larceny*.

E contra it was argued for the prisoner, that this is one of the exempted cases. It was admitted, that this was neither a chattel real nor a *chose* in action. But it was contended to be a thing that concerned the realty, as it related to the boundaries of manors and the height of water, which are points in which the very inheritance is affected. That these were of that nature which are called *nullius in bonis*, things whereto every man has a right to resort and to use them. And admitting they are in the custody of the crown, (and they can be but in one custody) it will not follow, that they are the property of the crown. There are two sorts of right, *jus proprietatis*, and *jus possessionis*.

That this is the first attempt of the kind, which according to *Co. Lit.* 81. a. is a strong argument against it: and the case 10 *E. 4.* was the opinion of all the Judges in the Exchequer Chamber. That the 8 H. 6. c. 12. was always considered as entirely a new law: wherefore judgment was prayed for the prisoner.

The

[1137]
Dalt. 173.

The court did not meddle with the question, whether this was properly said to be the goods of the King, nor with the question upon the 8 H. 6. c. 12. or as to stealing records at common law: but said, the point of these writings concerning the realty, was sufficient to found their judgment upon. They said there was a strong inclination in the Judges to make lodgers guilty of felony; but it was not done but by act of Parliament. And if there is any inconvenience in the present judgment, it may be rectified in that way.

They all therefore declared their opinions that the prisoner was not guilty.

2 Hawk. P. C.
Ch. 47. f. 6. ed.
7. 462.
Vide ante 1019.

Then the Chief Justice started a question, whether as this was undoubtedly a great misdemeanor, they could not give judgment as for a trespass; and desired that might be considered, and the prisoner brought up again at another day. And then Mr. Attorney and Solicitor cited 2 Hawk. 440. that if on a general indictment for felony a special verdict is found, and the crime be adjudged but a trespass; judgment may be given upon it, as for a trespass only. And Cro. Jac. 497. where on indictment for felony in stealing 18 d. the jury found, the defendant couzened the prosecutor out of the money; held no felony, but set six times on the pillory, as for a misdemeanor. They also cited 1 And. 351. Kelyng 29. Dalt. 331.

E contra it was insisted, that by this means a defendant is deprived of many advantages; if he was indicted properly, he might have counsel, a copy of his indictment, and a special jury: and it was observed that in the great case 10 Ed. 4. the Judge dismissed the prisoner. Besides now *felonice* is struck out, where is there any breach of the peace, for the verdict doth not find the taking was *vi et armis*.

Et per curiam, The prisoner must be discharged; in the cases cited *pro rege*, the Judges appear to be transported with zeal too far. The prisoner was discharged.

Folkes *vers.* Docminique.

The spiritual court may take a bond for a due administration where it is *cum testamento annexo*.

4 Burn's Eccl. L. 206. 234. 1 Ld. Raym. 86. ib. 363. 1 P. Wms. 7. ib. 547.

THE plaintiff declares on bond in the *detinet* against the defendant as administrator *durante minori etate* with the will annexed: and upon *oyer* the condition appears to be, for exhibiting an inventory and duly administering by paying debts

and

and legacies, the performance of all which the defendant avers: the plaintiff replies, that he had not paid a legacy of 1,500 l. though he had more than sufficient to pay all the debts, to wit, 500 l. And on demurrer it was objected, that this was a void bond, not warranted by 21 Hen. 8. c. 5. or at common law, by requiring an administrator to pay legacies or distribute according to the ecclesiastical decision; and should be taken to be obtained by coercion. 1 Vent. 166. Raym. 227.

[1138]

E contra it was argued, that this not being on an intestacy, was not according to the statute it is true; but is to be supported as a reasonable bond taken by the course of the ecclesiastical court. Hob. 250. Co. Ent. 128. And though formerly it was disputed, yet it is now settled, that they may compel distribution. Mo. 864. 2 Show. 396. 2 Lev. 163. 2 Jon. 90. 1 Saund. 162. That here the breach is assigned in non-payment of legacies, of which they have undoubted jurisdiction: and if it be good in any part (being a bond at common law) it is enough. 3 Co. 83. And it differs from the case where part of the condition is against a statute, for there it is void *in toto*.

Et per curiam, These administrations are not within 21 Hen. 8. and therefore we deny a *mandamus* (1). We must therefore consider it as a bond at common law; and then it is sufficient, if it be good in that part on which the breach is assigned (2), as we think this is, and we cannot take it to be a bond by coercion. Therefore the plaintiff must have judgment.

(1) *Smith's Case*, ante 892. R. (2) See in *Cheffran v. Nainby* ante 744.

Dominus Rex. *vers.* Greenwood.

HE came up on *habeas corpus* charged with a commitment for a robbery on the highway. And the prosecutor attending, insisted he was the man. And though eight affidavits of credible persons, proving him to be at another place at the time the robbery was sworn to, were read; yet the court refused to admit him to bail, but ordered him to remain till the assizes.

Bail.
Vide 2 Hawk.
P. C. ch. 15. l.
80. 7 ed. vol. 3.
p. 225. n. °.

Hardwick vers. Chandler.

Words, of an attorney.

IN an action by an attorney, the following words spoken of an attorney in his business were upon motion in arrest of judgment held actionable. "Mr. *Hardwick* is a rogue, for taking your money, and has done nothing for it; he has not entered an appearance for you; he is no attorney at law; he don't dare to appear before a judge. What signifies going to him? He is only an attorney's clerk and a rogue, he is no attorney (1)."

(1) *Day v. Buller*, 3 *Wils.* 59. *famation.* (D. 24.) 259. (F. 9) *Vide* the cases collected 1 *Com.* 269. *Dig.* Action upon the case for de-

[1139]

Elliot vers. Smith.

Practice on *scire facias* and execution against bail.

IT was held, that if there be fifteen days between the *teste* of the first and the return of the second *scire facias* against bail, it is sufficient; without any regard to the number of days between the *teste* and return of each (1); and that a *capias ad satisfaciendum* may be taken out against bail, without any *feri facias* or return of *nulla bona* (2).

(1) 2 *Cromp. Prac.* 84. *Imp.* turning *scire feci*, and the proceedings are by bill four days exclusive, are sufficient between the *teste* and return of it. *Bell v. Jackson*, 4 *Term Rep.* 663. *Prac. K. B.* 433. (2) 1 *Lev.* 226. 1 *Roll.* 897. *L.* 35. 2 *Cro.* 450. 3 *Salk.* 286. But where there is only one *scire facias* against bail, the sheriff re-

Dominus Rex vers. Whaley.

To a *mandamus* to admit a fellow of a college the court will expect the return of a visitor, and will not supersede the writ. *Ante* 565.

A *Mandamus* was granted, directed to the defendant as master of *Peter-house* college in the university of Cambridge, to admit *Thomas Rogers* to a fellowship of that college, upon an affidavit of his election. A motion was made to supersede this writ, upon affidavits of there being a visitor, viz. the Bishop of *Ely*. But the court put the master to make a return, and refused to determine the point on affidavits, where the other party had no opportunity to right himself by an action.

Between the Parishes of King's Norton and Cambden in Gloucestershire.

MARY Calcut a pauper was removed by two justices from King's Norton to Cambden. On appeal the sessions reversed the order, stating that the pauper was hired for a year to Ellis of Cambden, to spin yarn at 18 d. per stone, and that she was to provide herself with victuals and lodging. That she run the whole year, and boarded and lodged at her master's, allowing 2 s. per week for the same: but upon her examination she said, that by her contract she thought herself at liberty to play or be absent from her work as long as she pleased, only that she was not at liberty to work for any other master (1).

Hiring for a year to work by the piece gains a settlement. Burr. Sett. Ca. 152. and 2 Sess. Ca. 146. S. C.

Et per curiam, The sessions have done wrong in adjudging this no settlement in Cambden, for in fact here is a hiring and service for a year to the master there: and what her apprehension was, or whether she was paid by the year or by the quantity of her work, was immaterial (2). And therefore the order of sessions was quashed, and the order of the two justices confirmed.

- (1) *Rex v. Birmingham, Cald. C. 655. Rex v. Seaton and Beer. 77. Doug. 333. S. P.* 2 Bott by Const. 352. pl. 341.
(2) *Rex v. Dedham, Burr. S. S. P.*

Chapman *vers.* House, Slater and Goodacre. In Middlesex.

[1140]

IN trespass for taking goods and false imprisonment, House, one of the defendants, let judgment go by default; Slater, another defendant, demurred; and Goodacre pleaded Not guilty. It came on to assess damages as to House, to assess contingent damages as to Slater, and for trial as to Goodacre, who was acquitted: but then the question came between the other two, whether the jury could sever the damages. And *Lane v. Santee* (ante 79.) and *Lowfield v. Bancroft*, (ante 910.) were cited. The Chief Justice was of opinion, that as they had not pleaded jointly, the damages might be severed. So the jury gave 1 s. as to House, and 100 l. as to Slater.

Where there were several defendants damages were severed. (1).

Carth. 19.

(1) Where in trespass all the defendants suffer judgment to go by default, the damages cannot be severed, *Onslow v. Orchard*, ante 422. So where two having pleaded, and the issue is found against both and damages given, and a third has let judgment go by default, and damages are assessed against him for a writ of

enquiry, &c. judgment is entered for both, it is bad. *Long v. Sabin*, 1 Wils. 30. and see *Hill* and *Winsey v. Goodchild*, where the plaintiff having declared upon, and the jury found a joint trespass, the court held that the damages could not be severed. *B. R. Tr. 11 Geo. 3. 5 Burr. 2790. Bull. L. N. P. 94.*

M m 2

Michaelmas Term

14 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

Sir William Chapple, *Knt.*

} *Justices.*

Sir Dudley Ryder, *Knt. Attorney General.*

Sir John Strange, *Knt. Solicitor General.*

Harvey *vers.* Harvey. In Middlesex.

Executer and not
the heir shall
have hangings,
&c. 2 Com.
Dig. Biens (C.)
136. Bull. L. N.
P. 34. 2 Burn's
Eccl. L. 648.

IN trover by the executer against the heir, the Chief Justice held, that hangings, tapestry, and iron backs to chimnies, belonged to the executer: who recovered accordingly against the heir.

Ratcliffe, un', &c. *vers.* Besley.

An attorney
must be sued by
bill, though the
plaintiff be also
an attorney.

IT was held by the court, that if the plaintiff and defendant are both attorneys, the defendant must be sued by bill; and that the plaintiff cannot take out an attachment, and hold the defendant to bail, as he does in the case of a common person. This case therefore is an exception out of the general rule, that privilege takes away privilege (1).

(1) *Thompson v. Rash*, Barnes different courts, *vide ante* 837-44. *Shorster v. Packhurst*, 1 Black. and the note.
Rep. 19. *Contra* if they are of

Rich, on the demise of Lord Cullen et al' *vers.* Johnson et al'.

IN ejectment for mines the plaintiff proved himself lord of the manor, and that he was in possession thereof. But the same witness proving, that the defendants had had possession of the mines above twenty years; the court upon a trial at bar held this no evidence to avoid the statute of limitations, there being no entry within twenty years upon the mines, which are a distinct possession, and may be different inheritances; and therefore directed the jury to find for the defendants.

In ejectment for mines the possession of the manor is no evidence to avoid the statute of limitations. Bull. L. N. P. 102. S. C.

Ison *vers.* Fowen.

THE notice was to execute a writ of inquiry by *ten* of Practice. clock: and there being no defence made, the court set it aside for uncertainty (1).

(1) *Vide Langstaff v. Lamb*, ten being certain is good, *Last v. Barnes* 293. *Foster v. Smales*, *Ib.* *Denny, Barnes* 302. 295. But notice to execute it at

Ashley *vers.* Ashley.

THE Judge who tried this cause (which was upon a promissory note for 5000*l.* which the defendant insisted was forged) certified that the weight of the evidence was with the plaintiff, and he thought the jury would find for the plaintiff; but they found for the defendant.

No new trial where there is evidence on both sides.

Et per curiam, As there was evidence on the part of the defendant, the jury are the proper judges which scale preponderates. It cannot be said to be a verdict against evidence, and therefore we will grant no new trial. The next day between

Smith et Huggins et al'.

THE same rule was laid down, and a new trial denied: though there was but a weak evidence for the plaintiff, and the Chief Justice summed it up strongly for the defendant (1).

(1) *Ason. 1 Wilf. Hankey v. Trot- Parkhurst, ante 1105.* But as the distinction between a verdict against evidence
mas, 1 Black. 1. S. P. and Smith v.
M m 3

evidence and against very weak evidence must in many instances appear scarcely perceptible, and the granting new trials is intirely discretionary in the court, it rather seems as if the several cases upon the subject warrant the conclusion that the court will grant a new trial where the verdict is

manifestly against the weight of evidence, although some proof has been adduced on the other side. Provided injustice seems to have been done by the verdict, and the cause is of sufficient value. *Vide Berks v. Mason, Say. 264. Norris v. Freeman, 3 Wils. 39.*

[1143] *Dominus Rex vers. The Inhabitants of Welbeck in Nottinghamshire.*

It is a good return to a *mandamus* for appointing overseers that the place is not a village or township. 2 Sess. Ca. p. 198. No. 145. 1 Bott by Const. 24. pl. 43.

MANDAMUS suggests that there are several householders and farmers inhabiting and residing within the village of *Welbeck*, able to provide for the poor; and therefore commands the justices to appoint overseers of the poor. To this it is returned, that *Welbeck* is extraparochial, and is not, nor ever was reputed to be a village or township, and therefore they cannot appoint any persons to be overseers.

And upon argument this was held to be a good return. For though it does not answer the supposal of the writ, as to there being several substantial householders and farmers; yet it answers the point in 13 & 14 *Car. 2. c. 12.* by saying it is no township or village, or reputed as such: and it is to such places only that we can send a writ. (1)

Ante 512, 1071.

(1) *Vide Rex v. Severn and Arnold, Say. Rep. 278. Rex v. Justices of Peterborough. Ib. 238. Rex v. Justices of Bedfordshire. Cald. 167.*

The Case of Jonathan Evindon, an Attorney.

An attorney in London cannot be summoned on the militia. Where it is a personal service, it is a personal service although it may be executed by deputy.

HE being summoned to appear upon a muster of the militia in London, applied to the court for a writ of privilege, to be directed to the commissioners of lieutenancy: which being opposed, as not being a personal service, but what might be executed by deputy, it was argued largely at the bar. And the court having taken time to consider of it, this term gave their opinion: that this writ ought to go; for though by the 13 & 14 *Car. 3. c. 3.* this in respect of counties at large may be only a charge in proportion to the property of the inhabitants; yet the 27th section excepting London, and referring to the then commission of array; we think it was then considered as a personal service; and there can be no doubt but that in such case

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an attorney, who has a superior service, is to be exempted. And though he may have a deputy, that has been determined to make no alteration. *Mar. 30. 1 Vent. 16, 29. 1 Lev. 265. Cro. Car. 11.* And these writs have often been granted. *Co. Ent. 436. Off. Br. 164, 174.* In 4 *Ann. Smith's* case by *Holt*, and one to *Mr. Skynner* in Lord *Raymond's* time. The Chief Justice also declared, that on the like motion in *C. B.* for an attorney of that court, they were also of the same opinion (1).

(1) This seems to be *Heaton's* case, *Rep. Barnes 42, S. P.* But since 2 *Geo. 3. c. 20. s. 42.* the militia acts having allowed a commutation of service into a payment of 10*l.* it has been held that an attorney is not entitled to this writ to exempt him from serv-

ing in the militia, it being no longer deemed to be a personal service, upon which ground alone he could be entitled to it. *Gerard's* case. 2 *Black. Com. 1123.* Vide also *Mayor of Norwich v. Berry, 4 Burr. 2109.*

Elletson *vers.* Cummins.

[1144]

DEBT upon an arbitration bond, whereby the plaintiff and defendant submitted all matters in difference between them or either of them. The arbitrators awarded 30*l.* to the plaintiff in full of all demands, either in her own right or as executrix to her husband. And on demurrer it was insisted, that the arbitrators had exceeded their authority. And *Carth. 118.* was cited, and the case put of a grant of *omnia bona et catalla sua*, which does not pass goods *en autre droit.*

A demand as executrix is within a general submission to an award. *Ante 647.*

But the court held, that the submission was general enough. For the demand as executrix was a matter depending between them. And 1 *Roll. Abr. 246. pl. 2, 3. 3 Bulst. 65.* are strong 21 *H. 6. 19.* to this purpose. And though in *Cro. Car. 433.* there is an averment, that both sorts of demands were submitted, yet the court held it was not necessary. And the plaintiff had judgment.

Dominus Rex *vers.* Obrian.

INDICTMENT setting forth, that defendant intending to defraud the King, and unjustly to procure a payment to be made as to the widow of an officer, did knowingly publish a certain false and counterfeit affidavit, purporting to have been sworn by one *Elizabeth Roe*, before *Thomas Engier, Esq;* a justice of the peace, by which means he received 5*l. 6s. 8d.* of the paymaster

Publishing a false affidavit knowingly is an offence at common law. 2 *Sess. Ca. p. 366. No. 196. S. C.* Vide 9 *Geo. 3. c. 30. s. 6.*

paymaster of the King's bounty. And this was laid as an offence at common law.

Ante 747.

After verdict for the king, it was moved in arrest of judgment, that this not being laid to be forged by the defendant, was not an offence at common law, but he ought to have been indicted on 33 H. 8. c. 1. as for a false token. *Sed per curiam*, Since *Ward's* case this can never be doubted. And it has always been held, that the statute did not create a new offence, but only added a further punishment where the indictment is *contra formam statuti*. The 5 Eliz. c. 14. reciting the forgeries at common law, has the word *writings*, in contradistinction to deeds: and it is in the election of the party, in the case of forging deeds, to lay the indictment either at common law, or upon the statute. Judgment *pro rege*.

[1145]

Marten *vers.* Jenkin.

Where a negative finding is not necessary.

3 Geo. 1. c. 6.
s. 3.
See 2 Burr. Rep.
1013. n. to
3d Ed.

ON a *mandamus* to swear the plaintiff into the office of mayor of *Winchelsea*, it appeared by a special verdict, that the mayor must be chosen out of the jurats, and that the plaintiff 1 May 1739, was chosen a jurat, and sworn in, and continued so till 7 April 1740, when he was chosen mayor: that he had received the sacrament within a year before his election to be mayor, but not within a year before he was chosen a jurat. And the question was, whether the statute 5 Geo. 1. c. 6. § 3. could operate so as to give him the benefit of the non-prosecution in six months with regard to the previous qualification. And the court held it did, else he would be under some degree of disability or incapacity, when the act says none shall be incurred.

But then a doubt was made, whether as the verdict was silent as to any prosecution, it was sufficient for the court to give judgment upon; and whether it should not have been found negatively, there was none. But the court held it well enough, for the plaintiff had nothing more to do than to find his election; what is to avoid it, should come from the other side: and that as it is not found, there was a prosecution, which it lay upon the defendant to shew; they could not be warranted in saying the plaintiff's election was done away: and therefore they gave judgment for the plaintiff.

Dent *vers.* Coates.

Custom, uncertain.

PROHIBITION to a suit in the ecclesiastical court for a church rate, suggesting a custom in the parish of *Norballerton*, that whenever twenty-four parishioners, or the major part

part of them, meet and appoint how much shall be raised throughout the whole parish, a certain proportion thereof has been used to be raised by the hamlet of *Romanby* by their separate churchwarden, and paid over to the rest.

Upon issue joined, this custom is found. But then it was moved in arrest of judgment, that this is both uncertain and unreasonable, both as to the persons who make it, and the sum to be assessed on *Romanby*. And *Fitz. Bar.* 277. 1 *Roll. Abr.* 565. pl. 4. *Bro. Custom* 12. *Davis* 33. 1 *Keb.* 612. 2 *Roll. Abr.* 264. D. 1. 265. pl. 2. *Salk.* 657. *Latch.* 217. were cited.

Et per curiam, The custom is ill, for it may be made at a private meeting of a few parishioners, and the words *a certain proportion* fix nothing. The entry on record must be, *non obstante predicto, fiat breve de consultatione*. 2 *Town book of Jud.* 170. pl. 2.

[1146]

Dominus Rex vers. Jones.

HE was indicted for not taking upon him the office of overseer of the poor, upon a regular appointment; and on demurrer objected, that as he was to take no oath, and the 43 *Eliz. c. 2.* had inflicted pecuniary penalties for neglect of duty to be recovered in a summary way, he could not be indicted. *Sed per curiam*, Those penalties are for neglect of duty when he is the officer, whereas this indictment says he has obstinately refused to take the office upon him: the disobeying an act of parliament is indictable upon the principles of the common law. Judgment for the King.

Not taking upon him the office of overseer of the poor is indictable. 2 *Sess. Ca.* p. 326. No. 187. 1 *Bott. by Const.* pl. 347. p. 298. S. C.

Vernon et al' vers. Jefferys.

TEN plaintiffs bring covenant on articles of partnership: and on *oyer* it appeared, there were two others named in the deed, which at the close of it runs in the usual form, *In witness whereof all the parties have set their hands and seals*. Thereupon the defendant demurs, and on argument insisted, that the *oyer* is part of the declaration; and it is as bad as if the plaintiff had shewn that the covenant was with two others; and it could not be split into several actions. *Carth.* 301. *Lutw.* 680. 5 *Co.* 18. *Lutw.* 1544. *Allen* 41. 1 *Vent.* 34. 2 *Lev.* 74. 2 *Roll. Abr.* 22. *Et per curiam*, If the other two did not seal the deed, the plaintiff might have helped it by averment: but here on the *oyer* we must take it, they did seal. Besides, as they are named in the covenant as coveantees, they might join in the action, though

If one named in the indenture does not seal, he must be excluded by an averment. 5 *Com. Dig.* Pleader. (2V.2.) 618.

though they did not seal: this the defendant may take advantage of on *oyer* and demurrer. 2 Leon. 47. And therefore judgment must be for the defendant.

[1147]

Dominus Rex *vers.* Inhabitantes de Petham.

A certificate man's apprentice being assigned to a parishioner, gains a settlement. Burr. Sett. Ca. 114. and Seff. Ca. Ed. 1750. vol. 2. p. 209. No. 149. S. C.

UPON a special order it was stated, that the *pauper* was bound to a certificate man in *Tenterden*, and after living with him there two years, was by him assigned over to a parishioner of *Lidd*, with whom he inhabited and served for the remainder of the seven years. And the question arose on 12 Ann. st. 1. c. 18. which says, the apprentice of a certificate man shall gain no settlement; whether the assignment could give him one. And the court were all of opinion, he had gained a settlement in *Lidd*: for the act had not made the binding void, but has only taken away one of the consequences of such binding for the sake of the certificated parish. It never intended to meddle with the case of a legal parishioner's apprentice; and when once there is an assignment to such an one, it is the same as if it had been an original binding: the true construction of the statute is, that in respect to the certificated parish such binding and inhabitation shall give no settlement. (1)

(2) *Rex v. High and Low Bishopside.* Burr. S. C. 381. *Rex v. Siltou.* ib. 269. 1 Wils. 184. *Rex v. St. Peter's in Nottingham,* ib. 391. Say. 287. *Rex v. Spotland.* Burr. S. C. 527, S. P. In the report of this case by Sir James Burrow it appears that the pauper's father resided then at *Lidd* under a certificate, and had done so prior to the birth of the pauper. But this does not al-

ter the law of the case, for the pauper having gained a settlement by an inhabitation in *Tenterden* of more than 40 days, the certificate granted to *Lidd* was discharged as to him, and he became intitled to gain a settlement there in his own right. *Rex v. Great Torrington,* Burr. S. C. 428. *Rex v. Keynsham,* ib. 429. *Rex v. Abchurch in Gloucestershire.* Ib. S. P.

Hilary Term

14 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir Francis Page, *Knt.*

Sir William Chapple, *Knt.*

Martin Wright, *Esq;*

} *Justices.*

Sir Dudley Ryder, *Knt. Attorney General.*

Sir John Strange, *Knt. Solicitor General.*

Walker *vers.* Kearney.

A Rule for an attachment *nisi* being granted on the affidavit of the defendant; the party complained of shewed for cause, that the defendant had been convicted of forgery and stood in the pillory, and produced the record and an affidavit of the identity of the person. *Et per curiam*, The rule must be discharged, for we cannot suffer this affidavit to be read. *Salk.* 461. 5 *Mod.* 74. *Hawk.* 461. *Mich.* 12 *Geo.* 2. in *C. B.* *Nicolls v. Delahant* (a), the affidavit to hold to bail, being made by one convicted of forgery, was refused to be read. Indeed in *Charlesworth's* case, who had been convicted of forgery, his affidavit was read; but that was to defend himself against a complaint, where the prosecutor had in a manner appealed to his affidavit: but even there it was said, that to support a complaint it should not be read (2). If he cannot be a witness in a

Affidavit of one convicted of forgery not to be read to support a complaint (1).

(a) *Rep. Barnes* 78.
Prac. Reg. 49.

(1) *Jones v. Major*, ante 833. *Paulock v. Macbender.* 2 *Wils.* 18. self, where an amendment is moved for against him. *Atchison v. Eeritt*, *Corup.* 392. *Rex v. Gardner.* 2 *Burr.* 1117.

(2) Same distinction as to the affirmation of a quaker, which is admissible in exculpation of him-

civil suit where a third person is interested in his evidence, *fortiori* he shall not be received here.

Dominus Rex vers. Dr. Franchard.

Constable may be sworn in before a justice of peace.

HE was chosen constable of *Milborne Port* at the leet, which immediately adjourned, and he was afterwards sworn in before a single justice of the peace; and upon a motion for an information (1) as not being duly sworn, the court held it a good swearing (2). *Salk.* 175. *Sir T. Jones* 212. 2 *H. H. P. C.* 88.

(1) *Rex v. Goudge*, *post.* 1213. (2) *Rex v. Davis*, *Caf. temp.*
Sed vide Rex v. Sir Thomas Reynell, *post.* 1161. *Hardw.* 269. 2 *Harwk. P. C.* c. 10. f. 49. p. 103.

Bevis vers. Lindfell,

After judgment by default a promissory note set out in the declaration need not be proved.

IN *assumpsit* upon a promissory note, there was judgment by default, and on executing a writ of inquiry, the plaintiff did not produce the subscribing witness, but offered other evidence of its being the defendant's hand. And the court held, this was sufficient, for the note being set out in the declaration is admitted, and the only use of producing it is to see whether any money is indorsed to be paid upon it (1).

(1) *Mills v. Lyne*, *B. R. H. Billers et al' v. Bowles*, *Barnes* 26 *Geo.* 3. *Bayley on Bills*, *Appen.* 233. *Ellis v. Wall*, *ib.* 234. *No. 7. Anon.* 3 *Wils.* 155. *Green contra.*
v. Hearne, 3 *Term Rep.* 301. *acc.*

Smith vers. Crabb.

Court will not consolidate declarations in ejectment. *Post.* 1178.

TEN declarations on the same demise were delivered for ten houses in *Stenying* in *Suffen* in the occupation of ten persons. And the court being applied to, to have them all put into one issue, suggesting that the title was the same in all; they however refused to do it, for they said the lessor might have sued them at ten different times, and it would be obliging him to go on

on against all, when perhaps he might be ready in some of them only (1).

(1) It rather seems from this report, that each declaration was for a separate house. *Vide Grimstone v. Burgers, Barnes 176. Cas. also Cecil v. Briggs, 2 Term Rep. 639.* *Prac. C. B.* 119. where the court of C. B. did consolidate sixteen eject-

ments, each declaration being for a large number of messuages, and all being *verbatim* the same. See

Gegge *vers.* Jones.

UPON shewing cause against a prohibition, the court made the rule absolute, with a direction that the plaintiff should declare in prohibition: he tendered a declaration, but the defendant refused it, and applied to stay proceedings, as being willing to submit. The other insisted he had a right to go on, and so get at the costs of the motion, which he could not otherwise have. But the court stayed the proceedings without costs; saying the direction to declare was in favour of the defendant, who might waive it. Practice in prohibitions.

Easter Term

14 Georgii 2. Regis. In B. R.

Sir William Lee, Knt. Chief Justice.

Sir Francis Page, Knt.

Sir William Chapple, Knt.

Martin Wright, Esq;

Sir Dudley Ryder, Knt. Attorney General.

Sir John Strange, Knt. Solicitor General.

} *Justices.*

Chapman *vers.* Pointon.

No attachment
against a witness
unless reason-
able expences
were tendered
him.

A Witness was served with a *subpœna* at *Chester*, to attend at the sittings at *Guildhall*, and two guineas were tendered by the person who served it, and being objected to as too little, he declared he would give no more.

The witness not coming up, an attachment was moved for; and on shewing cause discharged: the court saying it was too little, and that the witness is not obliged to trust to the court's allowing him more when he comes to the book, for perhaps the party may not call him, and then it may be difficult for him to get home again: that this way of punishing as for a contempt was new, and practised only in this court; the Common Pleas not doing it to this day, but leaving the party to his remedy on 5 *Eliz. c. 9.* and therefore they would not enter into any nice calculations of the expence, but confined their inquiry to the question, whether the non-attendance was through obstinacy or not (1).

Ante § 10. 1054.

↑ 570

(1) *Stephenson v. Brookes*, S. P. in C. B. Barnes 33.

Beardesley *vers.* Baldwin.

A Promissory note to pay money within so many days after the defendant should marry, was (on consideration) held not to be a negotiable note within the statute (1). What a negotiable note.
Ante 706.

(1) *Vide Pearson v. Garret, v. Peake, 1 Burr. 323. Carter v. Comb. 227. 4 Mod. 242. Roberts Fancourt, 5 Term Rep. 482.*

Wilder *vers.* Handy.

IN trespass for killing a dog: after verdict for the plaintiff, it was moved in arrest of judgment, that the declaration run by recital, "Whereas, &c. But a bill being filed right (the time of filing which the court refused to enquire into) and on citing a case of *Smith v. Fuller* (a), in *C. B. Mich. 8 W. 3.* and *Cumb. 4.* the court ordered it to be amended: though they were sensible that for want of applying to amend, many judgments had been arrested. Amendment.
Post. 1162.
(a) 1 Ld. Raym. 116.

Neal, on the Demise of the Duke of Athol, *vers.* Wilding et al'.

ON a trial at bar, where the Duke was to make out his pedigree as heir of the *Derby* family, he offered (amongst other evidence) a special verdict in 1706, to which the present defendants were no parties) to prove three of the descents, which verdict was given in a cause where the premises in question were recovered on a general verdict, and the special verdict related only to other premises. And *Wright* Justice, was for receiving it, because in the case of pedigrees many things are received which are not allowed in other cases, as entries in family books, monumental inscriptions, heralds books, recitals in deeds, &c. which were introduced from the difficulty of proving pedigrees since inquisitions *post mortem* were left off. But the rest of the court refused to let it be read, being (as they said) *res inter alios acta*, and the same evidence, for any thing they knew to the contrary, might be ready to be laid before this jury, that was before that. *Vide Corth. 79. 181. 5 Mod. 386. Sir T. Jones 221. 2 Mod. 142 (1).* What evidence of a pedigree.

(1) But that the opinion of *Wright J.* is now held to be the law, *vide Bull. L. N. P. 233.*

Doe, on the Demise of the Dutcheſs of Hamilton, *verſ.* Hatheſley, et al'.

Where proceedings ſhall be ſtayed in a ſecond ejectment till coſts paid of the firſt (1).

Cumb 106. 110.

* See Rep. and Caſ Præſt. C. P. 78. n. to 2d ed.

THERE being judgment for the defendants in the great cauſe of *Thornby v. Fleetwood*, (ante 318.) and that affirmed in *B. R.* and the Houſe of Lords, upon the ejectments being brought by the remainder-man, in the life of Lord *Philip*, who though he had had a foreign education might conform; the Dutcheſs now, (Lord *Philip* being dead) brought a new ejectment, in which ſome of the then defendants were defendants now. And upon application to ſtay her proceedings till the coſts in the firſt ejectment were paid; the Dutcheſs inſiſted, that the former was on the demise of the Duke and her, and the rule was in the ſingular number, *quod demifſor querentis ſit onerabilis*. *Sed per curiam*, We are not going to order the Dutcheſs to pay * coſts, but only preventing her from being vexatious; which in 4 *Mod.* 349. is ſaid to be the foundation of theſe rules. Beſides, in this caſe ſhe proceeded after the death of the Duke, and therefore let the rule be to ſtay proceedings in this cauſe, till the coſts in the other are paid.

(1) *Vide Doe ex dem. Chambers*, 2 *Black.* 1180. and the caſes cited. *Short v. King*, ante 681.

James Baker's Caſe.

Bankrupt.

HE was taken up on an attachment for not performing an award. After which he became a bankrupt, and obtained his certificate: and now moved to be diſcharged, but was oppoſed, becauſe (it was ſaid) bankruptcy does not purge a contempt. *Sed per curiam*, This was a demand for which debt would lie, and the act ſays he ſhall not be arreſted, *proſecuted* or impleaded for any debt due before the bankruptcy. It would therefore be hard to keep him in cuſtody, when the duty is diſcharged. And therefore in this caſe he muſt be diſcharged (1).

(1) *Vide Rex v. Stokes*, *Cowp.* 136.

Smith *verſ.* Abbot.

What a good acceptance of a bill of exchange. Poſt. 1212. note (7)

THE defendant accepted a bill of exchange to pay it when goods conſigned to him, and for which the bill was drawn, were ſold. And the plaintiff counted upon the cuſtom of merchants. After a verdict for the plaintiff, it was moved in arreſt of

of judgment; that this acceptance depending upon the contingency of the sale of the goods was not within the custom of merchants, or negotiable. But the court (upon consideration) held it good. For though the plaintiff might have refused to take such an acceptance, and have protested the bill; yet no body can say he might not submit to it. And it will affect trade, if factors are not allowed to use this caution, when bills are drawn before they have an opportunity to dispose of the goods: a man who is drawn upon to pay at ten days sight may accept for thirty. *Molloy* 304. though the other might protest the bill. *Salk.* 129. *Cumb.* 452.

Filkes vers. Allen.

THE defendant in *Michaelmas* term was surrendered in discharge of his bail; and afterwards, without giving any notice to the plaintiff, was removed to the *Fleet*. The plaintiff in *Hilary* term charged him in execution as a prisoner in *B. R.* And this term the defendant moved for a *superfedeas*, that charge in the court where he was not a prisoner signifying nothing, and so two terms were elapsed. The plaintiff insisted, that he was in no default, not having notice of his removal; and that these removals do not appear upon the *committitur* book, where the charge in execution is to be made. But the court granted a *superfedeas*: for the plaintiff, they said, should have demanded to see the prisoner; and if not produced, would have known where to find him, and bring him back by *habeas corpus*, to charge him. And it would be putting difficulties upon prisoners, to oblige them to give notice.

Prisoner is not bound to give plaintiff notice of his removal to another prison to entitle him to a *superfedeas*. *Tidd's Prac.* K. B. 210.

Trinity Term

*14 Georgii 2 Regis. In B. R.

*14 & 15 See
Burr. Sett. Cal.
113. pl. 52. note
10 2d ed.

Sir William Lee, Knt. Chief Justice.

Sir Francis Page, Knt.

Sir William Chapple, Knt.

Martin Wright, Esq;

} *Justices.*

Sir Dudley Ryder, Knt. Attorney General.

Sir John Strange, Knt. Solicitor General.

Talbot vers. Hubble.

Where a city has
justices with an
exclusive clause,
the justices of
the county can-
not act in mat-
ters of excise.

THE question in this case was, whether as the city of *New Sarum* had an exclusive commission of the peace, the justices of the county of *Wilts* could by virtue of 12 *Car. 2. c. 23.* and 15 *Car. 2. c. 2.* act in excise matters within the city.

This case was argued three times at the bar, and this term the Chief Justice delivered the resolution of the court.

1. That the crown might grant to any city, to have justices of their own within themselves, and exclude the county justices from intermeddling in the ordinary business of a justice of the peace. *Bro. Letters Patent* 111. *Dalton* 24. 2 *Inst.* 71. (1).

(1) It was admitted in this case that unless there was a *non intramittant clause* in the commission or charter, the justices for the coun-

ty would have a concurrent jurisdiction. *Vide Rex v. Sainsbury* 4 *Term Rep.* 450. *Nol. Rep.* 15-
dec. acc.

2. That

2. That in such case the act of the county justices would be void, and not to be considered only as a breach of the franchise.
2 *Inst.* 557.

3. That though the 12 *Car.* 2. gives the jurisdiction in excise matters to the justices of the peace residing near the place where the forfeiture shall be made, or offence committed; yet it never was the design of the Legislature to make any alteration in the respective jurisdictions of the justices, but only to vest the excise jurisdiction in justices of counties, cities, and places, with respect to their several local jurisdictions within such places.

Bowyer vers. Bampton.

UPON a case stated at *nisi prius* in an action by the plaintiff as indorsee of several promissory notes, it appeared that the notes were given by the defendant to one *John Church*, for money by him knowingly advanced to the defendant to game with at dice, and that *Church* indorsed them to the plaintiff for a full and valuable consideration, and that the plaintiff was not privy to, or had any notice, that any part of the money for which the notes were given had been lent for the purpose of gaming.

The innocent indorsee of a gaming note can maintain no action against the drawer. But he may sue the indorser upon his indorsement.

Upon this a question arose upon the statute 9 *Ann. c.* 14. § 1. which says, "That all notes, where the whole or any part of the consideration is money knowingly lent for gaming, shall be void to all intents and purposes whatsoever," whether the plaintiff could maintain this action against the defendant. And after two arguments the court were of opinion he could not; for it is making it of some use to the lender, if he can pay his own debts with it: and it will be a means to evade the act, it being so very difficult to prove notice on an indorsee. And though it will be some inconvenience to an innocent man, yet that will not be a balance to those on the other side. And the plaintiff is not without remedy, for he may sue *Church* on his indorsement. And it is but the common hazard of taking notes of infants or *seme covert*s. As to what *Holt* said in *Hussey v. Jacob*, it was not the point adjudged, and the Chief Justice said, he had seen a report wherein notice was taken, that all the learned part of the bar wondered at it (1).

Salk. 344.
Carth. 356.
5 *Mod.* 175.
Com. Rep. 4.
1 *L. Raym.* 87.
12 *Mod.* 96.
Holt 323. S. C.

(1) *Vide* *Lowe v. Waller*, *Doug.* 741.

Shuttleworth *vers.* Pilkington.

Bail-bonds need not pursue the words of the return of process. Vide Tidd's Prac. K. B. 106, 107.
1 Term Rep. 240.

[1156]

T. Jon. 46.
lb. 137.
6 Mod. 122.

A Special original was taken out returnable *coram Domino Rege* *ubicunque tunc fuerit in Anglia*, and the bail bond was without the words *ubicunque*, &c. and in an action upon it, it was objected, that by the statute of *Hen. 6.* (which was pleaded) the sheriff could take no bond, but such as was to appear at the place in the writ mentioned; whereas this might be to compel an appearance out of *England*, if the King should happen so to be. *Sed per curiam*, There are no set forms of words for these bonds, but if in substance they are to appear according to the design of the writ, it is sufficient. 2 *Cro.* 286. 2 *Vent.* 237. 2 *Show.* 51. 2 *Lev.* 180. *Trin.* 3 *Geo.* 2. *Philips v. Philips*, in *Saccario*, upon a *quo minus*, the bond was to appear in the office of pleas in the court of Exchequer at *Westminster*; and that was held well enough, though the process was to appear before the Barons: we will understand, that by appearing before the King is meant *before the King in his court*, and not before the King in person. The plaintiff must have judgment. *Ante* 153.

Slicer *vers.* Thompson.

Amendment.
Fost. 1182,

THE judgment in *Ireland* was, that the plaintiff *shall* recover. And upon error here, it was amended to *do* recover, on the authority of *Blakey v. Birmingham*, *ante* 1132. (1)

(1) *Vide Short v. Coffin*, 5 *Burr.* 2730. *Rees v. Morgan*, 3 *Term Rep.* 349.

Between the Parishes of Kirton and Weston in Nottinghamshire,

Evidence of fraud is not sufficient in an order.

Furr. Sett. Ca. 166. and Sess. Ca. Ed. 1750. vol. 2. p. 189. No. 141. S. C.

UPON a special order of sessions it was stated, that the pauper took a farm of 10 *l. per annum* in *Kirton*, which had been let at that rent for six years last past, but before only at 7 *l. per annum*; and he also took a by-tack of 20 *s.* a-year in *Kirton*, and his family lived ten months there: that when he first took these tenements he was not of ability to stock them; and being told by the former tenant that 10 *l. per annum* was too much, he answered, he did not regard the dearness, for as it was 10 *l.* a-year it would gain him a settlement, and put an end to a dispute between two towns; but desired the former tenant, to take no notice of this to any body. The sessions determined this to be

be no settlement in *Kirton*: But the order being removed, was quashed: for the court said, they could not hold this to be fraudulent, it not being so adjudged, and evidence of fraud is not sufficient (1): and as to the value, they must take it to be according to the rent, unless the contrary was stated; for as it is a removal of a man from his farm, it should be shewn to be under value.

(1) In what instances the court may form the conclusion of fraud, although it is not specially stated by the sessions in their case. *Vide* *Whaddington and Tedford*, ante 1014. and the cases cited in the note.

Heathcote *vers.* Goslin.

[1157]

THE affidavit to hold to bail was, that the defendant borrowed 2000 *l.* of the plaintiff on bottomree, which money is now due and owing to this deponent by virtue of the said bond, as thereby may appear. I objected, that this was no oath of the debt; for suppose every penny is paid, and a separate receipt taken for it; yet upon the face of the bond the whole will appear due. *Et per curiam*, It is not sufficient. Then the plaintiff would have made a supplemental affidavit (1): but the court refused to receive it, for the act of Parliament requires a full oath, previous to the issuing the process, that defendants may not be harrassed. And therefore in this case the defendant was discharged upon common bail (2).

12 Geo. 2. c. 29. (C)
What a proper affidavit to hold to bail.

(1) *Emerson v. Hawkins*, 1 *Wils.* 335. acc. *Et vide* *Turner v. Warren*, *Andr.* 70. But the practice in *C. B.* is contra. *Vide* *Barnes* 66. 2 *Barnes* 58. 81. 84. 2 *Black.* 850.

(2) *Anon. B. R. Hil.* 19 *Geo.* 2. 1 *Wils.* 121. Where affidavit is only by way of reference it is bad. *Rollin v. Mills*, upon a bill of exchange *S. P.* 1 *Wils.* 279. *Jennings v. Martin*, on an eject-

ment, *S. P.* 3 *Burr.* 1447. *Rio v. Belifante*, *post.* 1209. On the master's allocatur *Powell v. Porterbach*, 2 *Term Rep.* 55. See also *Barclay v. Hunt*, 4 *Burr.* 1995. *Warbreck v. Wheeler*, *Barnes* 100. *Kelly v. Devereux*, *Say.* 59. But in the case of persons suing in the right of another person it is otherwise. *Watson v. Fransham*, *post.* 1219.

Wickes *vers.* Strahan.

A joint commission discharges each partner as to his separate debts.

(a) Mosely 80. S. C.

THE defendant and his partner in trade had a joint commission of bankruptcy taken out against them, under which they obtained a certificate; the plaintiff was a separate creditor, and had obtained a judgment before the commission or act of bankruptcy: and having now the body of the defendant in execution, the court was moved to discharge him, upon the authority of *Howard v. Poole*, (*ante* 995.) where it was held, that a separate creditor might come in under a joint commission: and also on *Abr. Eq. Cases* 55. 2 *Vern.* 707. 2 *Will. Rep.* 500 (a). And the court discharged him accordingly (1).

(1) *Twiss v. Massie*, 1 *Atk.* 67. *Horsley's case*, 3 *P. Wms.* 23. In the matter of *Simpson*, 1 *Atk.* 138.

Case of Aberystwith.

Mandamus.
Ante 1003. and
the note.
Post. 1180.

IN this case, and also in the case of *Tintagel* about four years ago, the court held, that though it was disclosed that there was a fact of election, yet if upon looking into it there was good reason to think it void, they would award a *mandamus* upon the act of Parliament, to go to an election, and not wait the event of any controversy about the former.

Dominus Rex *vers.* Pocock.

What words of a justice are indictable, and what not.

[1158]

AN information was moved for against him on account of words spoken of Mr. *Kent*, a justice of peace. And the affidavit stated, that in conversation about a warrant granted by Mr. *Kent*, the defendant asked if Mr. *Kent* was a sworn justice, and being answered to be sure he was, else he would not act, the defendant replied, If he is a sworn justice, he is a rogue and a forsworn rogue.

To this it was objected, that the words were not spoken to him in the execution of his office, but only in relation to what he had formerly done: and *Salk.* 698. was cited. *Et per curiam*, There ought to be no information. It is not the same insult and contempt, as if spoken to him in the execution of his office, which would make it a matter indictable (1).

(1) *Vide Rex v. Revel*, *ante* 421.

Dominus Rex vers. The Inhabitants of Great Bedwin.

AN order of two justices was made, without saying it was upon complaint of the churchwardens and overseers, nor that one of the justices was of the *quorum*, nor that the *pauper* (who was a certificate man) was become actually chargeable. Upon appeal to the sessions, they set all this right, under 5 Geo. 2. c. 19. which impowers them to amend defects in form, and proceed to the merits. *Sed per curiam*, This is going too far; they are to amend defects in form, before they go into the merits; whereas here they must go into the merits before they can introduce the amendment. It was never designed they should insert new facts, but only amend the informal way of setting out the facts which were stated. The order therefore for the amendment must be quashed, and also the original order.

Sessions cannot amend orders by adding new averments.
Burr. Sett. a. 163.
Sess. Ca. E. 1750. vol. 2. p. 190. No. 142.
S. C.

Michaelmas Term

15 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt.* Chief Justice.

Sir Francis Page, *Knt.*

Sir William Chapple, *Knt.*

Martin Wright, *Esq.*

Sir Dudley Ryder, *Knt.* Attorney General.

Sir John Sirangé, *Knt.* Solicitor General.

Goodburn *vers.* Marley.

Horse races are within the acts against gaming. a Show. 36. (2)

AN action was brought for 15 *l.* won as a wager at a horse-race (1). And upon a case made and argued, it was determined, that the action would not lie; for 16 *Car.* 2, c. 7. has these words *horse racing*, and a great many other words, which are not particularly mentioned in 9 *Ann.* c. 14. but are within the general words *other game or games*. And the court seemed to be of this opinion in *Oates v. Collins*, *Trin.* 6 *Geo.* 2. though it was never determined. *Vide* 1 *Vent.* 253. The defendant had judgment.

(1) "The wager was that the mare of one B. beat the defendant's mare." MSS.

(2) "According to a MSS note of this case," (belonging to a learned judge now upon the bench) it was objected in this case that inasmuch as a late statute was made against horse-racing that is an argument, that horse-racing was not prohibited by any of the former laws, for if it were, this statute need not have been made; and therefore it was said it could not be within the statute 9 *Ann.* But to this it was answered by the court, that though horse-racing might not be unlawful, yet betting

"at horse-races was so; and that the late act of parliament speaks only of running of horses or horse-racing but speaks nothing of betting at horse-races, which is the present case; and therefore that rule can not any ways off. & the present case." MSS.

Blaxton v. Pye, 2 *Wils.* 209. *Johnson v. Bann*, 4 *Term Rep.* 1. acc. See also in *Bidmead v. Galt*, 4 *Burr.* 2432. and in *Good v. Elliot*, 3 *Term Rep.* 706. A foot race has also been determined to be within the 9 *Ann.* c. 14. upon the principle and authority of this case. *Lynall v. Longbottom*, 2 *Wils.* 36. *Brown v. Barkely*, *Comp.* 281.

Chester *vers.* Crawley.

THE execution of a writ of inquiry before fourteen jurors was held good: for it is but an inquest of office (1), whereon no attaint lies. 2 *Roll. Abr.* 673, 674.

Fourteen jurors on a writ of inquiry good.

(1) S. P. in *Cook v. Beal*, 1 v. *Le Maistre*, *ib.* 368. *Hewit* *Ld. Raym.* 176. In *Beardmore v. v. Mantell*, *ib.* 374. *Bruce v. Carrington*, 2 *Wils.* 248. *Eichorn Rawlings*, 3 *Wils.* 62.

Dominus Rex *vers.* Beck.

[1160]

UPON an information for perjury in swearing a young girl to be of age, in order to obtain a licence; which was set out in *hac verba*: it appeared that the licence when granted was to marry in *Busbey*, *Watford* or *Aldenharn* in *Hertfordshire*, and then came a blank, which was filled up by the parson of *Pinner*, who celebrated the marriage, with the name of that parish, and as such it was described in the information.

Adding the name of a parish to a licence does not make it void.

Upon the trial at *Guildhall* before *Lee C. J.* he held that this addition did not make it a void licence, for the place is not of the essence of a licence; and the practice is to have these blanks, and fill them up afterwards. And he compared it to the case of a deed altered in a part not material by a stranger, which does not vitiate the deed.

Crookshank *vers.* Thompson.

THE defendant gave a bond of indemnity, and before any breach became a bankrupt. And being now sued, moved to be discharged on common bail. But the court compared it to the case of *Tully v. Sparkes*, (*ante* 867.) and ordered he should give special bail (1).

Where the breach of a bond is after a bankruptcy, the bond is no discharged. *Ante* 1043.

(1) *Smithson v. Johnson*, *Barnes* 113. S. P. *Cottrell v. Hooke*, *Dougl.* 97. *Alfop v. Price*, *ib.* 160. *Young v. Hockley*, 2 *Black.* 840. *Vanderbeyden v. De Paiba*, 3 *Wils.* 528. *Ex parte Ardney*, *Crowp.* 460. *Heskuyson v. Woodbridge*, 1 *Doug.* 166. *Talor v. Mills*, *ib.* 525. *Utterson v. Vernon*, 3 *Term Rep.* 539. 4 *Term Rep.* 570. And though the surety be liable in consequence of a breach, yet if he has not actually paid it till after the bankruptcy, he cannot prove it under the commission. *Paul v. Jones*, 1 *Term Rep.* 599. or unless he has been taken in execution, which is considered as a satisfaction. *Chilton v. Whiffin*, 3 *Wils.* 13. *Goddard v. Vanderbeydon*, *ib.* 262.

Hilary Term

15 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir William Chapple, *Knt.*

Martin Wright, *Esq;*

Thomas Denison, *Esq;*

} *Justices.*

Sir Dudley Ryder, *Knt. Attorney General.*

Sir John Strange, *Knt. Solicitor General.*

Dominus Rex *vers.* Sir Thomas Reynell.

Quo warranto
lies for a ferry.

THE court held, that an information in the nature of a *quo warranto* would lie for claiming an exclusive ferry over the Thames from Laleham (1): but discharged the rule, because

(1) In *Rex v. Nicholson*, ante 299. *Rex v. Hulston*, ante 621. and the cases cited in the note *Rex v. Boyles*, ante 836. *Rex v. Howel*, *Caf. Temp. Hard.* 287. *Rex v. Franchard*, ante 1149. and *Rex v. Jones*, *post.* 1213, the court seems either to have determined or taken it for granted that they can grant an information in nature of a *quo warranto* in the name of the clerk of the crown, at the instance of a private relator for a supposed usurpation of any office or franchise of a public nature. But in *Rex v. Marsden*, 3 *Burr.* 1812. all the Judges are rather of a contrary opinion, and declare that there are no traces of the King's coroner and attorney having filed such an information before 4 & 5 *W. & M. c.* 18. and *Anne*, c. 20. s. 4. and that such authority is not given by the former, as it was meant not to augment but to check the power of the crown office, and the latter only extends to corporate offices and corporate rights. Vide *Rex v. Williams*, 1 *Burr.* 402. 1 *Black. Rep.* 93. *S. C.* *Rex v. Marsden*, *ut supra.* and *Rex v. W. Wallis*, 5 *Term Rep.* 375.

it only appeared he took money of passengers, which is not setting up an exclusive right.

Dominus Rex vers. Jones.

A Plea in abatement was put in to an information in nature of a *quo warranto*, and set aside for want of a title to the affidavit annexed to it: for the practice in the crown-office cannot alter the act of parliament.

Affidavits requisite to a plea in abatement in the crown-office.

Marshall vers. Riggs.

[1162]

IN trespass it was moved in arrest of a judgment, that the declaration was with a *quod cum*; but the plaintiff filing a right bill, the court amended the declaration by it, though for want of thinking of this before many judgments had been arrested.

Amendment.
Ante 1151.

Dominus Rex vers. Cornforth et al'.

THE court granted an information against the defendants for taking away a natural daughter under sixteen, under the care of her putative father: being of opinion, it was within the third sect. of 4 & 5 P. & M. c. 8.

A bastard is within the statute of P. & M. 1 Bott. by Const. 405. pl. 536. S. C. more full.

Between the Parishes of Cotleigh and Stockland.

AN acre in *Cotleigh*, wherein *A.* had a lease for lives, was mortgaged to a *pauper* for 15*l.* When the mortgagor died, there was two years interest due, and he also owed 18*l.* 10*s.* to the mortgagee by bond and simple contract. And it was agreed between the widow and the mortgagee, that he should administer, and take all but the household goods, which he did. And the sessions having held, that his taking to this acre, and living on it eight years, did not gain a settlement under 9 Geo. 1. c. 7. which requires a *bona fide* payment of 30*l.* The court now quashed the order, it being to all intents of law and equity the same as actual payment of the consideration money.

What a purchase of 30*l.* value to make a settlement. Burr Sett. Ca. 169. S. C. more full.

Stroud *vers.* Tilly.Plaintiff may
amend the *venue*.

PER curiam, Though a plaintiff cannot regularly move to change the *venue*, yet he may in effect do it by moving to amend. And it was done so in this case, by striking out *Dorsetshire*, and inserting *Middlesex*. (1)

(1) *Rivet et al' v. Cholmondley* when changed by defendant even *et al. post.* 1202. *Hallet v. Hallet*, after the cause had gone down to *Wilf.* 173. *Savary v. Serle*, *Say.* trial, and need not move to 150. *Griffith v. Hollier*, *ib.* 294. amend, upon which he could only *S. P.* So also in a *qui tam* action, obtain a rule *nisi*. *Vide Bruckshaw v. Bennett v. Smith*, 1 *Burr.* *v. Hopkins*, *Corup.* 409. But see 402. But that the plaintiff may *v. Boddington*, 1 *Crompt. Pract.* 114. move to bring back the *venue*

[1163] Between the Parishes of St. Nicholas in Harwich and Woolverstone in Suffolk.

A certificate
man may be sent
back though
there is a
mistake in the
name of the pa-
rish to which
it is addressed.
Burr. Sett. Ca.
371. *S. C.* more
full.

THE pauper came into *Harwich* with a certificate from *Woolverstone*, addressed to the parish of *Harwich* near *Dover Court*, and delivered it to a parishioner, who did not appear to be an officer of the parish (1). The sessions were of opinion, he had not taken 10*l.* *per annum* in *Harwich*, and was therefore not settled there: but as there was a mistake of the name of the parish in the address of the certificate, they held *Woolverstone* could not be obliged to receive the pauper. But upon debate it was ruled they were; for it is not to be considered as a certificate to any particular parish, but as a general acknowledgment of his being a parishioner of *Woolverstone*, and is conclusive against them for all the world (2):
and

(1) The words of the order are,
"That the said *Thomas Paisons*
"(the pauper) went into the pa-
"rish of *St. Nicholas in Harwich*
"with the said certificate, and
"delivered the same unto Mr. G.
"D. an inhabitant of the said
"parish: but whether he was a
"churchwarden or overseer of the
"said parish did not appear."
(2) *Honiton v. Saint Mary*
Axe, *Salk.* 535. *S. P. et vide Rex*
v. Bishopside, *Burr. S. C.* 384.
But *All Saints v. Saint Giles*, *Salk.*
530. *Rex v. Lubbenham*, 4 *Tenn*
Rep. 251. are contra, *et vide*
Jones v. Arundel, 2 *Black. Rep.*
324. "But although the reason of
"this determination that a certifi-
"cate is not to be considered as
"one granted to any particular
"parish," seems irreconcilable
with these decisions; yet as *H.* was
the parish which *W.* had in con-
templation when it granted the
certificate, and as *H.* had regularly
received

and the delivery of it to an officer is not necessary
(3).

received the pauper, and had neglected to remove him upon the faith of its validity, perhaps the determination may not be considered as erroneous notwithstanding the weakness of the reasons upon which it is built. *Vide Rex v. Kirkby Stephen. Burr. S. C. 664. 2 Bott by Const. 799. pl. 748. S. C.*

(3) But if he keeps it in his own possession he shall not be considered as disqualified thereby either from gaining a settlement in

the parish to which it is given or from giving one to his apprentice; for the words of 8 & 9 W. 3. c. 30. are, "shall procure bring and deliver to the churchwardens, &c." *Rex v. Wensley, 5 Term Rep. 154. Nol. 182. S. C.* But such certificate as between the parish granting it, and that to which it is directed, will be conclusive evidence of a settlement against the former up to the time of its date. *Vide Rex v. Buckingham, Cald. 64.*

Easter Term

15 Georgii 2 Regis. In B. R.

Sir William Lee, Knt. Chief Justice,

Sir William Chapple, Knt.

Martin Wright, Esq;

Thomas Denison, Esq;

} *Justices,*

Sir Dudley Ryder, Knt. Attorney General,

Sir John Strange, Knt. Solicitor General,

Bogg *vers.* Rose.

Practice,

IT was settled (on consideration) that when a term's notice of trial is required upon an old issue, the notice must be given before the effoin-day, and that is a full term (1).

(1) *Hurvey v. Porter*, ante 211. *contra.* See *Peyton v. Burdus*. ante 1100.

Between the Parishes of Ladock and Saint Ennidore.

Serving out the year with an executor in another parish is a settlement there. Burr. Sett. Ca. 179. S. C. much fuller 19 Vin. Abr. 398. S. C.

A Person was hired for a year, and served half a year, when the master died: the executor (who lived in another parish) asked the servant if she would serve out the year with him; she did so: and now on the authority of the case of *Ivinghoe*, (ante 90.) the court held it a settlement in the executor's parish; for the last service is not to be considered as a new agreement, but a continuation of the first.

Dominus Rex *vers.* Sidney.

UPON removing an indictment from the sessions of *oyer* and *terminer*, the defendant and his bail entered into a 500*l.* recognizance to plead, go to trial, and appear on the return of the verdict. He did so, and received judgment. And upon motion to discharge the recognizance, it was insisted he should pay costs: but this not being in 20*l.* the sum required by the statute 5 & 6 *W. & M. c. 11*, the court held it was to be considered as a recognizance at common law (1). And precedents being searched, it was found, that costs had not been required. Here therefore being a performance of every thing the words extended to, the court discharged the recognizance (2).

Costs on removals of indictments are not required in a common law recognizance.

- (1) *Regina v. Ewer*, *Salk.* 564. (2) *Rex v. Fonseca*, 1 *Burr.* 10. S. P.

Dominus Rex *vers.* The Inhabitants of Sherborne.

A Certificate-man has a son born in the parish to which he was certified, who when sixteen years old hires himself as a servant to a button-maker in the same parish, and serves a year. And upon considering the words of 9 & 10 *W. 3. c. 11*, which declare, "That no person or persons who come in by certificate shall be adjudged to gain a settlement by any act whatsoever, except he takes 10*l.* per annum, or executes an annual office." The court held, that the son of the certificate-man was equally within it, and that therefore the hiring and service in this case gave him no settlement (1).

The son of a certificate-man gains no settlement by a hiring and service. *Burr. Sett. Ca.* 182. more full, and *Seff. Ca.* vol. 2. p. 385. No. 203. 1 *Seff. Ca. p.* 322. No. 255. S. C.

- (1) *Rex v. Bray*, *Burr. S. C.* *Buckingham*, *Burr. S. C.* 314. 259. 1 *Wils. Rep.* 121. *Rex v. Say*, *Rep.* 11. S. P.

Grey *vers.* Jefferson.

IN a *scire facias* against bail, the plaintiff made a mistake in setting out the recognizance, which the defendant took advantage of by pleading *Nul tiel record*; and afterwards the plaintiff moved to amend it, but was denied; for *scire facias*'s against bail are never amended, and the course is for the plaintiff to quash his own writ. This may be to defeat the bail of an opportunity to surrender, which he would have done, if he could not have been sure of succeeding in his plea.

Scire facias against bail not amendable, *Ante* 401.

Dominus Rex *vers.* Fletcher.

If one smuggler
has no arms he
is not within the
statute though
the others have
arms.

THE defendant was indicted on the act 9 Geo. 2. c. 35, s. 10. for being armed and assisting in running uncustomed goods. Upon trial a special verdict is found, whereby it appeared that they were above three in company, and all the others had fire-arms, but the defendant had only a common horse-whip. And upon argument the court strongly inclined, that he was not guilty: for the act makes it a material circumstance in each man's case, and these acts are to be taken strictly. They did not however determine it upon the first argument, but gave Mr. Attorney General time to consider of it; who upon conference with me declined to argue it, and the prisoner had judgment, and was discharged.

Dominus Rex *vers.* Moravia.

Order of bastardy.

Say. 61. 309,

310.

1 Bott. by Const.

437. pl. 596.

S.C. more full.

AN order of bastardy stated, that the woman was *delivered of a child baptized in the parish of A.* and it was objected that this does not import it to be born there, which is the only circumstance to warrant the parish's applying for relief. But the court said, that by a reasonable construction it may be so understood, and confirmed the order.

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VOL

Trinity Term

* 15 Georgii 2 Regis. In B. R.

* 16. See Burr.
Settl. Cas. 187.
pl. 66. note to
2d Ed.

Sir William Lee, Knt. Chief Justice.

Sir William Chapple, Knt.

Martin Wright, Esq;

Thomas Denison, Esq;

} *Justices.*

Sir Dudley Ryder, Knt. Attorney General.

Sir John Strange, Knt. Solicitor General.

Dominus Rex vers. Taylor.

THE court granted an information against him as for a nuisance, on affidavits of his keeping great quantities of gunpowder, to the endangering the church and houses where he lived.

Keeping gunpowder in great quantities is a nuisance.

Pitts vers. Meller et ux.

IN trover against both, and judgment and execution against both: the court refused to discharge her out of custody, unless it could be shewn that there was fraud and collusion between the plaintiff and the husband to keep her there (1).

Baron and feme,

(1) *Finch v. Duddin*, post 1237.

Langstaffe v. Raine, 1 *Wils.* 149.

Filmer v. Butler, *Say.* 149. *Anon.*

Wils. 124. *Berryman v. Gilbert*,

Barnes 203. *S. P. Jackson v. Ga-*

st., 1 *Ventr.* 51. seems contra.

but if the wife is in custody upon

fine process, she shall be dis-

charged out of custody upon filing

common bail, if her coverture

VOL. II.

clearly appears. *Lawford v. Gardiner*, *Barnes* 96. *Harrison v. Bearcliffe et ux*, post 1272. *Roberts v. Andrews*, 2 *Black.* 720. and the cases there cited. *Anon.* 3 *Wils.* 121. *Edwards v. Rourke*, 1 *Term Rep.* 486. and see *Holland v. Erskine*, *Barnes* 100. *Pearson v. Meadon*, 2 *Black. Rep.* 903.

Kent *vers.* Pocock.

Words of a justice actionable.

TH E S E words spoken of a justice of peace in the execution of his office, and relating thereto, were held actionable, *viz.* *Mr. Kent is a rogue*, according to the case of *Aston v. Blagrove*, (*ante* 617.) 1157.

Beale *vers.* Moor.

Where full costs.

IN trespass the defendant justified for a way, and the plaintiff replied *extra viam*, and obtained a verdict and damages under 40s. But the court allowed full costs, because this is a case where the right came in question (1).

(1) *Higgins v. Jennings*, *ante* 726. S. P.

Between the Parishes of Road in Somersetshire and North Bradley in Wilts.

The court will intend an order late served, where the order on appeal is made at the next sessions but one.
3 Seff. Ca. p. 280. No. 220. S. C.

A Pauper was removed from Road to North Bradley. North Bradley gave notice to appeal, on which Road took him back, but however got their order confirmed at sessions. The next sessions set both aside as fraudulent. And now Road insisted, that the order was good, as not being appealed from at the next quarter session. And as to the other, that it was not in the power of one session to set aside the act of the other (1). All being now before the court, they quashed the first order, as being properly quashable on appeal; and would not take notice, that it was not at the next sessions after service of the order, which being in the case of a recent appeal they would suppose to have been served too late for an appeal to the next sessions (2). And as to the order of confirmation, they quashed that, as not being made on any appeal, and consequently without jurisdiction (3), and at the same time quashed the latter part of the second sessions order, that rescinded that confirmation, as not being properly before them.

- (1) *Vide* *Rex v. Cockfield*, 2 Salk. 477. *Rex v. Turley*, 1 Seff. Ca. 175. pl. 215. acc.
(2) *Rex v. Norton*, *ante* 831. (3) 2 Salk. 479. S. P.

Between the Parishes of Lydlinch and Hilton.

THE case of *New Windsor and White Waltham, (a) Trin. 5 Geo. 1.* turning chiefly on the certificate's being conclusive to the parish which gave it, and certified two persons as man and wife: it now came under debate again, and was determined, that the bastard of a certificate person is settled where born, and is not a *child* to be sent back within the meaning of the statute.

Bastard of a certificate person is settled where born.
Burr. Set. Ca. 187, and Sess. Ca. Ed. 1750. vol. 2. p. 249.
No. 170. S. C.
(a) Ante 186.

* It was agreed that the word *child* meant a legitimate child only. See Burr. Settl. Caf. 190. Note to 2d Edition.

Jackson, qui tam, &c. *vers.* Giffing.

[1169]

IN debt on the statute 15 Car. 2. c. 8. for selling fat lambs alive, the defendant pleaded that in the same term another informed against him and recovered. And on demurrer it was held ill, according to 2 Lev. 141. because he did not set out the days on which each bill was exhibited, that so the court might judge of the priority (1).

Plea of a recovery in another personal action must shew the day each bill was exhibited.

(1) This was a plea in bar, *Vide* 3 Burr. 1428. where the present note is corrected. Its accuracy however is sustained by *Dennison J. lb. 1434.* But that there is no distinction in this point between a plea in bar and one in abatement, and that in both the particular day must be set out. *Vide Coombe v. Pitt, 3 Burr. 1423. 1 Black. 437. S. C.*

Davis *vers.* Miller et ux'.

THESE words, "You cheated the lawyer of his linen, and stood bawd to your daughter, to make it up with him, you cheat every body, you cheated me of a sheet, you cheated Mr. Saunders, and I will let him know it:" were held not actionable, without a *colloquium* of the plaintiff's trade or profession (1).

Words not actionable.

(1) *Vide 1 Com. Dig. Tit. Action for Defamation. (F. 7.) 268.*

Michaelmas Term

16 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir William Chapple, *Knt.*

Martin Wright, *Esq;*

Thomas Denison, *Esq;*

} *Justices.*

Sir Dudley Ryder, *Knt. Attorney General.*

Sir John Strange, *Knt. Solicitor General.*

Ball *vers.* The Hundred of Wymersley in Northamptonshire.

What is a good
notice within
8 Geo. 2. c. 16.
in an action
against the hun-
dred (1).
Bull. L. N. P.
185.

UPON a case made at the assizes on the statute of hue and cry, it was stated, that soon after six in the morning the plaintiff was robbed at two miles and an half distance from *Northampton*, and the highwayman cut his bridle and stirrups, threw them into a ditch, and turned his horse loose; that the plaintiff recovered them, remounted, rode through a village called *Cotton*, where he gave no notice, met three men on the road whom he informed of the robbery, and arrived at *Northampton* by seven of the clock, and gave notice to an inn-keeper there, from whence he went to *Rotherthorpe*, three miles off, where the high-constable lived, and between eight and nine gave notice. And whether this was sufficient to maintain the action within 8 Geo. 2, c. 16. which requires that the party robbed shall "with as much convenient speed as may be after the

(1) *Vide Whitworth v. The Hundred of Grimstoe*, 2 Wils. 105. 4 Com. Dig. Hundred (C. 4.) 356.

"robbery

" robbery give notice to one of the constables of the hundred,
 " or to some constable of some town, parish, village, hamlet,
 " or tithing, near unto the place where such robbery shall hap-
 " pen," was the question.

And the court on argument held it to be good notice, for the high constable is the properest person to go to, and it is not required he must go to the next constable. It appears the plaintiff lost no time, considering the circumstances he was in; and *Rotherthorpe* is not at such a distance, but that it may come within the meaning of the word *near*. So the plaintiff had judgment.

Coy verf. Hymas.

THE plaintiff obtained judgment for 388 *l. 0 s. 1 d.* In Variance.
 debt thereon he described it as a judgment for 388 *l.* only, omitting the penny: the defendant pleaded *Nul tiel record*: and on issue joined insisted on the variance. The plaintiff desired it might stand over, and at another day produced the record with a *remittit* of the penny added. The court resented this as an abuse of their indulgence, and said they would still consider it in the situation it was in before: or if not, yet the variance was not cured, for a *remittit* must be before judgment, whereas this is after. And considering it as reducing the first judgment, is making an inconsistency on the record. The most it can amount to is, an acknowledgment of satisfaction of so much of the money recovered. The defendant had judgment of *deficit de recordo*. Ante 1110.

Holloway verf. Smith.

IN trespass the defendant justifies a distress for toll, and sets forth a custom in *Darenty* to hold a fair on *St. Austin's* day and take toll; and that *Queen Elizabeth* reciting all this, had granted them two new fairs, one on the *Tuesday* after *Easter*, and the other on *Saint Matthew's* day, with all profits, commodities, emoluments, liberties, and free customs ad hujusmodi serias pertinen'. On demurrer the justification was held ill, for toll is not incident of common right (1), and therefore not within the words of reference; and being new fairs, upon which no toll is granted by express words, the custom cannot extend to them. So the plaintiff had judgment. Toll is not incident to a fair.

(1) *Vide Mayor, &c. of Northampton v. Ward*, post 1238.

Oates on the Demise of Elizabeth Hatterley *vers.* Jackson,

"Devise to *A.* for life, and after her death to *B.* and her children of her body begotten or to be begotten by *C.* her husband, and their heirs for ever" one child being born at the time this creates a joint-tenancy between *B.* and her children.

3 Com. Dig.
Devise (N. 8.)
437. Fearn on
Cont. Rem.
4 Ed. 462.
8 Vin. Abr.
Devise (Y. a.)
239.
5 Term Rep.
324.

UPON a case made at the assises, it was stated, that *Ralph Clay* being seised of an estate called *Woolfe's Park*, devised it in these words, "As to *Woolf Park* I give it to my wife *Annabella* for her life, and after her death to my daughter *Isabella Addibell* and her children on her body begotten or to be begotten by *William Addibell* her husband, and their heirs for ever." That the wife is dead, and *Isabella* at the time of making the will had one daughter *Elizabeth*, and afterwards two sons and one daughter, who are all dead without issue: that *Elizabeth* had issue the lessor of the plaintiff: that *Isabella* survived *William Addibell* and married *Jackson*, by whom she had a son the present defendant, who entred on her death.

The question was, what estate passed to *Isabella* and her children by *William Addibell*; the plaintiff insisting, that *Isabella* was only tenant for life, and the children of that marriage had the reversion in fee: the defendant insisting, that *Isabella* was jointly seised in fee with the children, and having survived them all, and left him her son and heir, he is intitled.

And after several arguments the Chief Justice delivered the resolution of the court: that *Isabella* took as joint tenant. It being stated, that at the time of making the will she had a child, which has been construed to be equal to children. 2 Vern. 106. Co. Lit. 9. is exprefs, that to *A. et liberis suis* and their heirs, is a joint fee to all. And it is no objection, that by this means the several estates may commence at different times. Co. Lit. 188. Pollexf. 373. Mo. 220.

As *Isabella* therefore survived all the children she had by *William Addibell*, the whole fee vested in her, and descended to her son the defendant. Who had judgment accordingly.

Between the Parishes of *Nympsfield* and *Woodchester* in Gloucestershire.

An order un-appealed from to remove a man and his wife is conclusive as to after-born children. Bur. Sett. Ca. 191.

IN 1731, a man and his wife were removed from *Nympsfield* to *Woodchester*, and there was no appeal. They had afterwards returned to *Nympsfield*, and had there three children who were now sent from *Nympsfield* to *Woodchester* together with the father. And upon appeal as to the children, it was offered to give

1 Bott. by Const. 492. Pl. 331. S. C.

in evidence, that the man had a former wife, and consequently the children born at *Nympsfield* were as bastards settled there. The sessions refused to let *Woodchester* go into this evidence, being of opinion, that *Woodchester* was concluded by the first order unappealed from, and that it made no difference that the children were born afterwards.

The court upon debate confirmed both orders. For the marriage being established by the first order, the settlement of the children (which is derivative) follows of course; and can no way be impeached, but by entering into the merits of the first order, which has been acquiesced in. And nothing is more established, than that an order unappealed from is conclusive, *Salk. 524, 527. Carth. 516. (1)*

(1) *Rex v. Silchester, Burr. S. Southwam, 1 Term Rep. 353. C. 551. Rex v. Kirkby Stephen, 2 Rex v. Kenilworth, 2 Term Rep. Butt by Const, 799. pl. 748. Rex 598. S. P. v. Hinkworth, Cald. 42. Rex v.*

Between the Parishes of Great Charte and Kennington.

TWO justices of peace made an order of removal, which was quashed at sessions, because one of the justices of the peace was an inhabitant of the parish from whence the pauper was removed (1). Upon debate in *B. R.* it was insisted, that 13 & 14 Car. 2. c. 12. gives the power to any two justices of the peace: and so has been the practice. And the instance of corporations where there are but two justices of the peace, or but one parish, was insisted on. And besides there lay an appeal.

A justice cannot join in removing a pauper from his own parish. *Burr. Sett. Ca. 104. S. C. with another point.*

But the court held, that this was a judicial act, and the party interested is tacitly excepted. Lord *Raymond*, who lived in the parish of *Abbotts Langley*, went off the Bench, when one of

(1) This statement, that the justice was an inhabitant, was thought by the court to be insufficient, and they said that the case ought to be actually amended, in pursuance of which it was stated "that he was charged and chargeable, and paid the poor's rate." *Burr. S. C. 195.*

their orders came before the court. They said the practice could not overturn so fundamental a rule of justice, as that a party interested could not be a Judge. And as to the case of corporations, they said, that if it appeared there were no other justices, it might be allowed to prevent a failure of justice. And therefore they confirmed the order of sessions. *Vide* the act 16 Geo. 2. c. 18. to remedy this. *Salk.* 396, 607.

Stamma vers. Brown.

Where the master acts only for the benefit of his owners, it is not barratry though it may be a deviation or breach of contract. *Vide* Park on Mar. Insur. 86. and the cases collected there. *Ross v. Hunter*, 4 Term Rep. 33.

THE ship the *Gothick Lyon* being advertised to be going to *Marseilles*, goods were shipped on board her on behalf of the plaintiff, and a bill of lading signed by the master, whereby he undertakes to go a *droit route a Marseilles*, and the defendant underwrote a policy from *Falmouth* (where the goods were taken in) to *Marseilles*: before the ship departed from the port of *London*, another advertisement was published for goods to *Genoa*, *Leghorn*,* and *Naples*; and the plaintiff's agent was told, it was intended to go to those ports first, and then come back to *Marseilles*; but he insisted that his bargain was to go first or directly to *Marseilles*, and he would not consent to let her pass by *Marseilles*, or alter his insurance.

[*1174]

The ship however did pass by *Marseilles*, and after delivering her cargo at the other ports, set out on her return for *Marseilles* with the plaintiff's goods: but in her voyage thither was blown up in an engagement with a *Spanish* ship. And in an action upon the policy, the breach was assigned of a loss by the barratry of the master. And the plaintiff insisted, that any fraud or malversation of the master was within the meaning of the word *barratry*. *Disfranchise* terms it *dolus qui fit in contractibus*; and so do all the dictionaries, as *Florio's Italian Dict.* verbo *barrataria*; *Minshew*, *Furetier*, &c. And that in the cases of *Knight v. Cambridge*, and *Knight v. Dodd*, *Pass.* 10 Geo. 1. where the loss was laid to be *per fraudem* of the master, the court held it a good assignment of a breach, there being the word *barratry* in the policy.

Ante 581.

The defendant's counsel insisted, this was no more than a deviation, in which case the insurer is discharged, and the plaintiff's remedy is against the owners or master. That this cannot be called a crime in the master, when he is acting all the while for the benefit of his owners.

The Chief Justice in his direction to the jury told them, that this being against the express agreement to go first to *Marseilles*, seemed

seemed to be more than a common deviation; being a formed design to deceive the contractor. And compared it to the case of sailing out of port without paying duties, whereby the ship was subjected to forfeiture, and which has been held to be barratry.

The jury staid out some time, and upon their return asked the Chief Justice, whether if the master was to have no benefit to himself by passing by *Marseilles*, and went only to the other places first for the benefit of his owners, that would be a barratry? And the Chief Justice answering, No, they found for the defendant.

And now a new trial being moved for, the case was argued; and all the court was of opinion, that the verdict was right. For the master has acted consistent with his duty to his owners, and the plaintiff's agent knew of the intended alteration, before the goods were put on board, and might have refused to ship them, or have altered the insurance; that to make it barratry there must be something of a criminal nature, as well as a breach of contract; and that here the breach being assigned only on the barratry, was not supported by the evidence. So the defendant had judgment.

[1175]

Barker vers. Suretees.

ON a special verdict in ejectment, the question turned upon these words in a will, *viz.* I give the said premises to my grandson, his heirs and assigns, but in case he dies before he attains the age of twenty-one years *or* marriage, and without issue, then and in such case he devised the same to the defendant. The fact was, that the grandson attained twenty-one, and died having never been married. And it was insisted, that the attaining twenty-one was a performance of the condition, and vested the estate absolutely in the grandson, under whom the lessor of the plaintiff claimed. And judgment was accordingly given in the county palatine of *Durham*, whereof error was brought in *Banco Regis*.

Or rejected in the construction of a will. MSS. S. C.

And after several arguments, the court affirmed the judgment, upon the authority of *Price v. Hunt* in *Pollexf.* 645. where the word *or* was construed conjunctively. And they said they would read this without the word *or*, as if it run, "And if he dies before twenty-one, unmarried and without issue;" which he did not do, for one of the circumstances failed. And all put together are but in the nature of one contingency: and it

was

was considerable, that this was not a condition precedent, but to destroy an estate devised by the former words in fee (1).

The cases relied on *e contra* were 2 *Vern.* 388. *Cro. Car.* 154. *Sir W. Jones* 205. 1 *Roll. Abr.* 835. pl. 4.

(1) *Frammingham v. Brand*, 1 *Wilf.* 140. 3 *Atk.* 390. S. C. and the opinion of *Pratt C. J.* in *Right v. Hammond*, ante 429. S. P. *Collinson v. Wright*, 1 *Sid.* 148. 1 *Eq. Ca. Abr.* 188. pl. 8. *Sewell v. Garret*, *Moor* 422. So also in the surrender of a copyhold, *Wright v. Kemp*, 1 *Term Rep.* 47. But where the devise was to trustees and their heirs to receive the rents till *B.* should attain 21, or have issue; and if *B.* should attain 21, or have issue, then to *B. and the heirs of his body.* But if *B.* should happen to die before 21, and without issue, remainder over. *B.* attained his age of 21, and died without issue. Lord *Hardwicke* considered the word *and* as used for *or*, and decreed the remainder over to take place. But he said it would be otherwise if the first demise had been to *B. and his heirs.* *Brown-sword v. Edwards*, 2 *Ves.* 240. *Fearn Cont. Rem.* 3 ed. 399.

East-India Company *vers.* Chitty.

At what time a goldsmith's note must be demanded.

AT half an hour after eleven in the morning of 18 *January*, the defendant being indebted to the plaintiffs, paid to their cashier a note of *Caswell and Mount*, goldsmiths in *Lombard-street*; they continued to pay all notes till the next day at two; and immediately after they had stopt payment, the company's servant came with the note. The question was, who should bear the loss? And upon examining merchants, it was held, that the company had made it their own, by not sending it out the afternoon of the 18th, or at furthest the next morning. So there was a verdict for the defendant (1).

(1) It was formerly the practice to leave the reasonableness of the time in which payment was to be demanded to the jury as being a question within their province, *Vide Hanky v. Trotman*, 1 *Black. Rep.* 507. But as this was productive of endless uncertainty, it is now considered as a question of law arising out of the fact, *Metcalf v. Hall*, *K. B. Tr.* 22 *Geo.*

3. *Bull. L. N. P.* 275. *Appleton v. Sweetapple*, *B. R. M.* 23 *Geo.* 3. *Bayley on Bills*, 73. *Tindal v. Brown*, 1 *Term Rep.* 107. and it seems also established that the next day after a banker's draft is given, is the stated time allowed by law for the demanding payment, in order to exonerate the holder from the consequences of the drawer's insolvency.

Memorandum. Having received a considerable addition to my fortune, and some degree of ease and retirement being judged proper for my health; I this term resigned my offices of Solicitor General, King's Counsel, and Recorder of the city of London, and left off my practice at the House of Lords, Council Table, Delegates, and all the courts in Westminster-hall except the King's Bench, and there also at the afternoon sittings. His Majesty, when at a private audience I took leave of him, expressed himself with the greatest goodness towards me, and honoured me with his patent to take place for life next to his Attorney General, Anno ætatis mee 47.

Hilary Term

16 Georgii 2 Regis. In B. R.

Sir William Lee, Knt. Chief Justice.

Sir William Chapple, Knt.

Martin Wright, Esq;

Thomas Denison, Esq;

} *Justices.*

Sir Dudley Ryder, Knt. Attorney-General.

The Hon. William Murray, Solicitor General.

Tomlin vers. Purlis.

An affidavit may be joined, though there is not an exact affirmative and negative.
3 Will. 6. S. C.

DEBT was brought in an inferior court at *Rochester* upon a bond. The defendant pleaded *duress* of imprisonment. To which the plaintiff replied, that he was at large, and at his own disposal, and executed the bond of his free will; and not for fear of imprisonment: and concludes to the country. To this there was a demurrer, and judgment given for the plaintiff.

It was now objected on error, that it is not said, he was *extra quamlibet prisonam*, which is the ancient way of pleading: and that at least the replication should have concluded with an averment.

Sed per curiam, This is such an affirmative as implies a negative; like the case of pleading in a writ of right, where the demandant counts, that he has more right than the tenant, and the plea of the tenant is, that he hath more right than the demandant. The ancient rule of requiring an affirmative and negative has been long broke into, as in the common case of in-

fancy, where formerly they not only replied full age, but also traversed the infancy, which is not now required. Sir Tho. Jones 6. It is enough, if the second affirmative is so contrary to the first, that the first cannot in any degree be true (1). So the judgment was affirmed.

(1) *Co. Lit.* 126. *Sav.* 86. *Kitt.* 214. b.

Harrison *vers.* Grundy.

THE court held, that on 9 & 10 W. 3. c. 15. they could not receive any complaint to set aside an award, till the submission was made a rule of court: and that a consent in the submission bond, to make the award a rule of court, instead of the submission, would not warrant their interposing.

When awards are to be complained of.
1 Com. Dig. Arbitrament, (D.) 534.

Paterfon *vers.* Tash. At Guildhall.

IT was held by C. J. Lee, that though a factor has power to sell, and thereby bind his principal, yet he cannot bind or affect the property of the goods by pledging them as a security for his own debt, though there is the formality of a bill of parcels and a receipt. And the jury found accordingly.

Factor cannot pawn (1).

(1) Not even to the amount of *Kenyon C. J. Daubigny v. Duval*, his lien for a general balance. 5 *Term Rep.* 606.
Per Buller & Grose J. hesitante Lord

Mynot *vers.* Bridge et al'.

TWO declarations were delivered at the suit of the same plaintiff against the same defendants, one of them for a right of way from one part of a close to one part of a town, and the other was for another way from another part of the close to another part of the town: and the court refused to consolidate them, because the plaintiff may be ready as to one, and not as to the other: and in the case two years since of *Smith v. Crabb*, for the same reason the court refused to consolidate several declarations in ejectment.

Where the court will not oblige consolidating of declarations (1)

Ants 1149.

(1) *Vide Cecil v. Briggs*, 2 *Term Rep.* 639.

Serecolt *vers.* Hamson, Bart.

THE defendant was outlawed in a personal action, without any affidavit made of the plaintiff's demand: and having brought error, he assigned his being beyond sea at the time of the outlawry, for which the court made no difficulty to reverse.

Where special bail is required on reverting outlawry. 1 Wms. 3. S. C.

[1179]

reverse it. But then the question was, upon what terms they should do it, the plaintiff insisting on special bail, and having now made a proper affidavit; and the defendant insisting to file common bail only.

The court upon considering the words of 4 & 5 W. & M. c. 18. § 3. which empowers the outlaw to appear by attorney (as he did here) and says, "It shall be reversed without bail in all cases, but where special bail shall be ordered by the court," declared they were of opinion, they had a discretionary power to require it or not; and that the want of an affidavit before, was no objection, because that is only requisite to warrant an arrest; and here was one in time, for the new action that must be brought. And though the 31 Eliz. c. 3. § 3. is the only act that expressly requires bail; it is not to be inferred from thence, that in other cases it ought not to be insisted on; for that act makes a new error, and the bail upon it is absolutely to pay the condemnation money (1).

Tidd's Pract.
K. B. 65.
Lit. Rep. 301.
Salk. 496.
Carth. 459.
Cases in King
William's time
549. Gilb. H.
C. P. 19.

(1) Vide *Ducket v. Martin*, ante Pract. K. B. 71, 72.
951. See the cases cited Tidd's

Martin, on the demise of John Tregonwell, Esq. vers.
Strachan et al.

Tenant in tail
with the rever-
sion in fee ex
parte materna
suffers a common
recovery, the old
use is gone, and
it descends to
his right heir.
2 Will. 2, 66.
4 Bro. P. C. 426.
and a very full
note of the judg-
ment of Lee, C.
J. 5 Term Rep.
107.

IN ejectment for lands in the county of Dorset, a special ver-
dict was found, whereon the short state of the case was this:
tenant in tail ex parte materna (1), with the reversion in fee in

(1) Vide MSS. note of C. J. "and Jacob; John died without
"Lee's opinion whereby it appears "issue; Jacob entered and suffered
"that this report is very defective. "a common recovery and died with-
"John Tregonwell being seized in "out issue and intestate" B. F.
"fee, on the marriage of his daugh- "The tenant in tail in this case
"ter Mary with Francis Luttrell, "who suffered the recovery took his
"settled his estate (after several pre- "estate tail by purchase under the
"cedent estates for life), To the "settlement (that is he was the first
"use of the first and other sons of "person who took under the limita-
"the marriage in tail male, with re- "tion) had he taken the estate tail
"mainder over, reversion in fee to "by descent, it would after the reco-
"himself. There was issue of this "very have gone to the heirs of the
"marriage a son and two daughters; "first purchaser of the tail." MSS.
"the son died without issue an infant, Vide Abbot v. Burton, Salk. 59.
"Mary survived Francis Luttrell, cited supra Roe ex dem. Crow v.
"and married Sir J. Banks, by Baldwere, 5 Term Rep. 104.
"whom she had issue two sons, John

himself

himself on the part of the mother also, suffers a common recovery to the use of himself in fee. And whether this fee on his death vested in his heir on the part of the father, or of the mother, was the question.

And after two arguments at bar, the Chief Justice delivered the resolution of the court: that by the common recovery to the use of himself in fee, the title under the settlement was destroyed, and a new fee acquired, descendible to the right heir of him that suffered the recovery. He said, it was true, that if *A.* so seised, had made a feoffment to the use of his own right heirs, it would work no alteration, but be the same use, according to *Co. Lit.* 13. 3 *Lev.* 406. *Salk.* 590. But that is only in the case of a descent; whereas here the estate-tail he took, was as a purchaser *per formam doni*. In the case of a common recovery the recoveror has a fee as the grantee of tenant in tail, *Poph.* 5. and a full fee passes. The case of *Simmonds v. Cudmore*, *Salk.* 338. was upon the operation of a fine, which differs widely from that of a recovery. The charges of tenant in tail affect the fee gained (*Poph.* 7.) but no act or charge of the remainder man subsists, which shews nothing of his estate passes. 1 *Co. Capel's* case (2). The lessor of the plaintiff therefore, claiming only as heir

(2) This case is very briefly and confusedly stated; the reasoning as I have collected it from the other reports of the case is as follows: If tenant in tail by purchase with the reversion in fee *ex parte materna*, levies a fine, &c. the land shall descend to his maternal heirs, *vide Simmonds v. Cudmore*, *Salk.* 338. 1 *Shew.* 370. but if he suffers a recovery of the lands, as is the case here, it shall go to his paternal. The ground of the difference is this: The fine destroys the estate tail as much as if the tenant in tail had died without issue. The absolute fee therefore which the conusor had in reversion, becomes thereby vested in possession; besides which the base fee passes to him also by the fine. But this being the weaker estate, it merges in the former. The tenant is therefore

seised of a fee which coming *ex parte maternâ* must descend in the same line. But a recovery is a species of conveyance excepted out of the statute *de donis*, *Benson v. Hudson*, 2 *Lev.* 26. When it is used, the tenant in tail may pass the fee, as he might have done a conditional fee after issue born prior to that statute, by any other species of conveyance. A recovery therefore passes a full and absolute fee simple, which is totally independent of the reversion, since a rent charge created by him in reversion would be destroyed by the recovery. *Poph.* 6. *Vide also* 1 *Rep.* 6. n. a. 2 *Rep.* 53. As the use of a fee then passes out of the tenant in tail to the recoveror, it results back to the former where no use has been declared, and the estate which he thus has is a fee simple, unconnected with

heir on the part of the mother, there was judgment for the defendants.

Affirmed in the House of Lords, by the unanimous opinion of all the other Judges (3).

with the reversion. It does not therefore partake of its descendible quality, but having vested in the consor by purchase, must descend to his heir at law. The rule laid down here extends to copyhold as well as freehold lands. *Roe ex dem Crow v. Baldwere*, 5 Term Rep. 104. and that there is no difference in this respect between them in case of a devise, *per Pratt C. J. ante 491*. In what cases a devise to an heir shall change the course of descent, and in what not, *vide Smith v. Trigg, ante 491*. and the note *Allan v. Heber*, and the cases cited in it,

post. 1270. So also where legal and equitable interests descend in different lines, the latter merges in the former, and descends with it. *Goodright v. West al'*. Dougl. 770.

(3) This case in 1 Wilk. 6 seems to be a report of it in the House of Lords, for the special verdict is stated to have been found upon a trial at bar in *B. And Willes*, then Ld. C. J. of C. delivers the judgment which seems to have been given about the same time that the judgment of *B. And Willes* was affirmed in *Dom. Proc. Vide Bro. P. C. 486*.

The Case of the Corporation of Scarborough.

Mandamus.

A *Mandamus* was moved for on 11 Geo. 1. c. 4. § 2. to go to the election of bailiffs, coroners, chamberlains, and the other annual officers of the corporation; there not having been any good officers since the year 1736, and those that have been in fact chosen, several of them had judgments of *ouster* against them. And upon considering the cases of *Tintagel* and *Aberystwith*, (*ante 1003, 1157*.) court granted a *mandamus*: here being no reasonable expectation of justifying the rights of the present possessors, and the act being made to prevent the confusion in corporations, that must ensue. And they said it should go not only for the head officer, but also for the others who were necessary constituent parts of the corporation, and equally with in the reason of the statute (1).

(1) *Vide Rex v. Woodrow*, 2 Term Rep. 732.

Howarth *vers.* Willett.

A Declaration upon a policy was laid in *Lancashire*, and delivered here 8 *February*. I moved on an affidavit that it was signed at *Bristol*, and that the common affidavit to change the venue was sent for, that we might have time. And the court inclined to have relieved us, if it had not appeared to arise in *Bristol*, where there is no *Lent* assizes (1); and they could not order it to an adjacent county, without consent of both sides, though the defendant offered his consent to avoid delay (1).

(1) *Southouse v. Boak*, *post.* 1216. *Nichols v. Bolster*, cited *Wilf.* 138.

Morres, Baronet, *vers.* Barry.

ERROR of a judgment in ejectment for lands in *Ireland*, where there are two demises laid of the same premises for the same term both as to commencement and duration; and the judgment is, that the plaintiff recover his *terms* (in the plural number) in the premises. The court will make any possible intendment to support a judgment in ejectment. 1 *Wilf.* 1. S. C.

It was objected, that both lessors could not have a title to demise the whole; and therefore there was an inconsistency in the judgment, and *non constat* which of the lessor's rights is established.

[1181]

Sed per curiam, As this is after a verdict, a bare possibility of title consistent with the judgment will be sufficient. The two lessors might be jointenants, and yet refuse to join in a lease; and having an interest in every part of the land, it was not improper for each to demise the whole. The judgment does not intitle the plaintiff to hold one moment longer, than he ought to do if it had been *term* in the singular number. So the judgment was affirmed. Ante 908. Ante 835.

Herbert *vers.* Griffiths.

TO debt on bond for performance of covenants, the defendant pleaded *Nil debet*, to which there was a demurrer and joinder in demurrer. And upon the defendant's consent to put the plaintiff into as good a condition as if he had pleaded right at first, the court permitted him to waive his first plea, and plead performance of covenants (1). Plea waived after a joinder in demurrer. 1 *Crompt. Pract.* 170.

(1) *Vide Jefferys v. Walter*, 1 *Black.* 357. *Meard v. Philips*, ante *Wilf.* 177. *Olding v. Arundel*, 1 906, and the cases there cited.

VOL. II.

P p

Dominus Rex vers. Thomas Sergison, Esquire.

Information.
2 Hawk. P. C.
ch. 26. f. 9.
7 ed. 4 vol. 90.

AN information was moved for against him for not condemning a horse taken out of a team under the statute 5 Geo. 1. c. 12. which requires proof to be made before a justice, of the cause of forfeiture; and the party who seized tendering his own oath, the defendant scrupled to take it (1), or determine the affair, in the absence of the owner or driver. *Et per curiam*, They were both reasonable objections. Why is not the person who seized, and is to have the benefit of the forfeiture, within the reason of excluding informers where there is a penalty? *Making proof* must mean *legal proof*. The other also is but natural justice. There are exceptions in the act as to one stone, or one piece of timber, though drawn by ever so many horses; and ought not the owner to have an opportunity of shewing it? The rule was discharged with costs.

(1) *Rex v. Moore, cas. temp. Andr. 18. S. P. Vide Rex v. Hardw. 176. Rex v. Piercy, Tilly, ante 316. and the note.*

[1182]

Between the Parishes of Atherton and Barton.

Agreement to
part on a month's
notice does not
reduce it under
a hiring for a
year. *Ante* 950.
Burr. Set. Ca.
203. S. C.

A Person settled in *Atherton* hires himself into *Barton* for one year, at 4*l.* wages, and either master or servant to be at liberty to determine the contract at the end of any quarter, upon a month's notice. And it is stated, that he served the year out, but that at the time of the hiring the *pauper* declared, he made the agreement in that manner, to prevent losing his former settlement. And upon this case the two justices and sessions held it no settlement in *Barton*.

But the court on debate quashed both the orders; for this is the common sort of hiring for a year, with an intention to stay together (as in fact they did); and if this should be determined not to gain a settlement, it would overturn great numbers of settlements that subsist on such hirings.

Hilliersdon vers. Skildroy.

Amendment af-
ter error brought.

AFTER error in the Exchequer Chamber, the court amended the judgment, by adding the introductory words to the awarding a writ of inquiry, *viz. That the plaintiff ought to recover*

Hilary Term 16 Geo. 2.

recover his damages against the defendant. For this is but a consequence of determining that the replication which the defendant demurred to was good. *Vide ante 1132. Blakey v. Birmingham, and Slicer v. Thompson, ante 1156.*

Scrimshire *vers.* Alderton. At Guildhall. /1743

THE plaintiff, who was a farmer in the isle of *Ely*, sent up oats to *Bear-key*, consigned to one *Hunt* as his factor. The custom of the trade appeared to be, that formerly the factor had 4 *d.* per quarter for selling them, and they gave immediate notice to the farmer of the name of the buyer, and the price: but this being inconvenient to farmers at a distance, it had for many years past been customary for the farmer to allow 2 *d.* per quarter more, upon the factor's taking the risque of the debts: since which they had ceased to inform the farmers of the buyers. The goods in the present case were sold; but the factor failing, the plaintiff (before actual payment) gave notice to the defendant (the buyer) not to pay the factor, which he did notwithstanding: and thereupon this action was brought.

Where goods are sold by a factor who has agreed to take the risk of the debts, the vendee is answerable for the amount to the owner, if he has received notice from him to pay him and not the factor, previous to his having paid the latter. (1).

The Chief Justice was of opinion, that this new method had not deprived the farmer of his remedy against the buyer, provided there was no payment to the factor. And the only reason of advancing 2 *d.* per quarter was, to have both at stake: and here being notice before actual payment, there could be no harm done. And therefore he directed the jury in favour of the plaintiff. They went out and found for the defendant; were sent out a second, and a third time to re-consider it, and still adhered to their verdict; and being asked man by man, they separately declared they found for the defendant. Upon this a new trial was moved for, and no cause being shewn was accordingly granted. And at the sittings after this term it came on again before a special jury; when the Chief Justice declared, that a factor's sale does by the general rule of law create a contract between the owner and buyer. But notwithstanding this, the jury found for the defendant; and being asked their reason,

[1183]

(1) Mr. J. Buller, in his *Law Nisi Prius*, p. 130. seems to be of opinion with the jury, that the particular circumstances of this case discharged the operation of the general rule of law, "that the sale of the factor creates a

contract between the owner and the buyer," for that from the agreement to take the risque of the debts upon him, the factor himself was to be considered as the debtor to the owner. (2)

P p 2

declared,

See Esst v. Miskeworth as cited in Louth Bauld. Term
Mr. Justice Buller is said to have held the just.
that the rule in Scrimshire v. Alderton to be good law.

Hilary Term 16 Geo. 2,

declared, that they thought from the circumstances no credit was given as between the owner and buyer, and that the latter was answerable to the factor only, and he only to the owner.

Seaman *vers.* Fonereau. At Guildhall, -

If a material circumstance of danger is concealed from an insurer, the policy is void, although the loss does not happen by its intervention (1).

ON 25th *August* 1740, the defendant under-wrote a policy from *Carolina* to *Holland*. It appeared the agent for the plaintiff had on 23d *August* received a letter from *Cowes* dated 21st *August*, wherein it is said, "The 12th of this month, I was in company with the ship *Davy*, (the ship in question) at twelve in the night lost sight of her all at once; the captain spoke to me the day before that he was leaky, and the next day we had a hard gale." The ship however continued her voyage till 19th *August*, when she was taken by the *Spaniards*; and there was no pretence of any knowledge of the actual loss at the time of the insurance, but it was made in consequence of a letter received that day from the plaintiff abroad, dated 27th *June* before.

Several brokers were examined, and proved that the agent ought to have disclosed the letter; for either the defendant would not have under-wrote, or insisted on a higher premium. And the Chief Justice was of that opinion, and declared, that as these are contracts upon chance, each party ought to know all the circumstances. And he thought it not material, that the loss was not such an one as the letter imported; for those things are to be considered in the situation of them at the time of the contract, and not to be judged of by subsequent events; he therefore thought it a strong case for the defendant, and the jury found accordingly.

(1) *Vide* the several cases collected upon this subject, *Park on Mar. Insur.* 179.

Easter Term

16 Georgii 2 Regis. In B. R.

Sir William Lee, Knt. Chief Justice.

Sir William Chapple, Knt.

Martin Wright, Esq;

Thomas Denison, Esq;

}

Justices.

Sir Dudley Ryder, Knt. Attorney General.

The Hon. William Murray, Solicitor General.

Middleton *vers*: Price: |

IN trespass and false imprisonment against the plaintiff in the action and the officer, they jointly justified under a process of the court at *Welch Pool*, returnable at the next court. And it not being shewn, that any return was made, the court held, that the officer (1) was a trespasser *ab initio*, and that the plaintiff by joining with him in the plea, is equally affected by the defect of it. And therefore there was judgment against them both.

A justification under a returnable process is ill without shewing a return of it, and if the plaintiff join with the officer there must be judgment against both.
1 Will. 17. . C,
Ante 993.

(1) But a bailiff or other subordinate officer need not shew that the writ was returned, because it is not in his power, as he is only to execute the sheriff's warrant.
Britton v. Cole, Salk. 409. B. L.
N. P. 23.

Dominus Rex *vers.* Monkhouse.

No replevin of
goods taken upon
a conviction.

THE court granted an attachment against the under-sheriff of Cumberland, for granting a replevin of goods distrained on a conviction for deer-stealing (1).

(1) *Vide Rex v. Burchet*, ante 567. note. "The sheriff was advised and had express notice before he granted the replevin, that the goods were irreplevisa-

ble: and the ground of the decision was, that the conviction was conclusive, and its legality could not be questioned in a replevin." MSS. 196.

[1185] Lewis, on the Demise of the Earl of Derby, *vers.* Witham.

A recovery without seisin is imperfectly found, and no *venire facias de novo* shall go. 1 Wils. 48, 55. More full 4 Bro. Par. Ca. 504. S. C.

UPON a special verdict in ejectment, the defendant claimed under a common recovery, whereby it was insisted the lessor of the plaintiff was barred. But exception being taken, that no writ of seisin or execution is found, the court was of opinion the defendant could not take any advantage of the recovery. It was then moved, that a *venire facias de novo* might go, this being an old recovery an hundred years ago, on which execution would be presumed; and in fact there was a writ of seisin and a return, and so this recovery is completely found in a cause now depending on the demise of the Duke of Athol: it was likewise insisted, that the minutes find this recovery *provi*, &c. and therefore warrant the inserting this.

Sed per curiam, A *venire facias de novo* can only be granted upon what appears to the court on this record; and unless the record warrants it, it will be error to grant it. 8 Co. Lovelock's case. It is not the verdict, but the defendant's title that is imperfect: how can we suggest, that the jury have misbehaved themselves; and yet that must be an introduction of a *venire facias de novo*.

It was then prayed, that an entry might be made of its being asked and denied: but as to that, the court said, that as it was to issue upon the record, it would be grantable by the court where error was brought: as was done in the House of Lords lately in the case of the wine-licence office. Ante 1125.

Ante 1053.

Affirmed in the House of Lords upon the questions put to the Judges in both respects (1).

(1) This has always been considered as a strange case, a writ of seisin never being in fact executed. *Per Lord Kenyon C. J.* in *Goodright ex dem. Burton v. Rigby*, 5 Term Rep. 179.

Dewey *vers.* Sopp.

THE defendant obtained time to plead, on the terms of pleading an issuable plea, rejoining *gratis*, and taking short notice of trial. The action was on a bond, conditioned to surrender a copyhold at the request and costs of the plaintiff; and the plea was, that the plaintiff never requested: the plaintiff replied a request, and made up the issue with a rejoinder to the country; which the defendant struck out, and demurred, so near to the assizes, that the plaintiff expecting a trial, had the record made up, and actually tried the cause before he heard of the demurrer. And now upon motion, the court set aside the verdict: for the construction of these terms put upon defendants, when they ask time to plead, is not to oblige them in all events to join issue to the country; but only where the replication offers a fair issue, and affords no reasonable cause of demurrer (1). Now here the replication not shewing any tender of a surrender, does give such a colour of objection, as will warrant what the defendant hath done.

The defendant is not bound by a consent to rejoin *gratis*, if the replication affords cause of demurrer.

[1186]

(1) That a fair demurrer is an issuable plea within a judge's order, *vide* Stonehouse v. Powell, 88. Gray v. Ashton, 4 Burr. 1788. in B. R. Wright v. Russell, 2 Black. Rep. 923. S. P. in

C. B. Nesbet v. Farmer, Barnes 168. *contra* in C. B. and Sutton v. Waddilove, *ib.* 314. *vid. acc.* but it does not appear there whether the demurrer was frivolous.

Soresby *vers.* Sparrow.

THE plaintiff declared in covenant, making a *profert* of the counterpart executed by the defendant, and assigned the breach in non-payment of rent. The defendant demanded *oyer*: and upon search the plaintiff could not find it, and upon affidavits of his inability to give *oyer*, applied to the court to dispense with it, the defendant having the original lease, and therefore not inconvenienced. But the court on consideration declared they could not do it; the plaintiff was bound to make a *profert*, else his declaration would be demurred to; the defendant is by law intitled to *oyer*, and the denial of it would be error. They said this does not depend upon any particular rule of the court, but on the general right of law, which the court cannot dispense with. 1 Mod. 266. It was the plaintiff's fault to bring the action, before he had the deed, or a proper discovery. And it is not like the case of a defendant

Oyer of a deed not to be dispensed with though shewn to be lost. 1 Will. 16. 3 Term Rep. 153. S. C.

whose deed is in the plaintiff's hands, where the court will grant imparlances from time to time until it is produced (1).

(1) *Vide* Doctor *Leyfield's* case, 10 Rep. 93. *a. Snelgrove v. Bailey*, 3 Atk. 214. *per Hardwicke C.* But it is now held that the proper method of pleading this deed would have been "that it was lost by time and accident," and without a *proferet*, *Read v. Brookman*, 3 Term Rep. 151. But where the party has made a *proferet* and lost

the deed, he may move that the production of a copy shall be *oyer*, or if he have none, to amend his declaration and plead as above. *ib. Totty v. Nesbitt*, *ib.* 153. n. 1 *Crompt. Praet.* 141. *Matison v. Atkinson*, 3 T. R. 153. n. And see the case of *Whitfield v. Fauisset*, 1 Vex. 392.

Smith *vers.* Nicholson.

Plaintiff cannot call for the return of a *capias ad satisfaciendum* pending error. 1 Will. 16. S. C.

Ante 867.

THE plaintiff in order to proceed against bail took out a *capias ad satisfaciendum* on the 3d of December, on the 4th a writ of error was allowed, notwithstanding which he called for a return of *non est inventus*; and then waiting till the writ of error was at an end, proceeded by *scire facias* against the bail. And now upon motion the whole proceedings were set aside; for the ground of them, *viz.* the return of *non est inventus*, was obtained after notice of the writ of error, which in its nature stopt all sort of proceedings, and the sheriff could not so much as look after the defendant in order to ground such a return upon (1).

(1) *Vide Perkins v. Woolaston*, Salk. 321. 6 Mod. 130. 2 Ld. Raym. 1260. S. C.

[1187]

Sir John Hartop *vers.* Alderman Hoare et al'.

There can be no market overt for pawning, and the court cannot take notice of the custom of London as to shops (1). 1 Will. 8, 9. 3 Atk. 44. 4 Vin. Abr. tit. Bailment, 9. S. C.

IN trover for jewels, the jury found this special verdict. That the plaintiff being owner of the jewels, lodged them in the hands of *Seamer* a goldsmith for safe custody only, inclosed in a paper sealed up, and that also inclosed in a bag sealed up with the plaintiff's seal, and took a receipt from him for the same. That *Seamer* broke the seals, and carried the jewels to the de-

(1) *Marsden v. Panshall*, 1 v. *Metcalfs*, 2 Vern. 691. *ib.* Vern. 407. *Hoare v. Parker*, 2 698. which seems *contra*. Term Rep. 376. See *Demulbray*

sen dam's

defendant's open shop in *Fleet-street*, where they traded in jewels, and often lent money on the security of jewels, and there borrowed of them 300*l.* and deposited the jewels as his own, by way of security, at the same time giving his note for the money. That *Seamer* had no authority from the plaintiff to sell, order, pawn, or dispose of the jewels, and that the defendants have converted them to their own use.

This cause was twice solemnly argued at the bar, the first time by serjeant *Prime* and Mr. *Mildmay*, and the second time by myself and Mr. *Bootle*. And this term the Chief Justice delivered the resolution of the court as follows.

The general question in this case is, whether the property found to be originally in the plaintiff is divested by any act found to have been done in this case. In order to consider this, it will be proper to see 1. How *Seamer* stands with regard to the plaintiff, and 2. With regard to the defendants.

1. As to the plaintiff, he is a mere bailee for safe custody only, without any authority to open the bag the jewels were in; and he was a trespasser in so doing. 4 *Co.* 23. *Mo.* 248. *Co. Lit.* 89. *a.*

2. As to the defendants, though they came honestly by them, yet they are within the general rule of *caveat emptor*, unless something appears particularly to exempt them. What they rely upon is, that they are purchasers of them in a market overt, it being found that they bought them in an open shop, where they dealt in jewels, which according to the custom of *London* is a market overt for that purpose.

To this it was properly answered by the plaintiff, that this custom not being found, the court cannot judicially take notice of it; and in all cases these customs are pleaded or found. For this purpose was cited the case of *Argyle v. Hunt*, *Trin.* 5 *Geo.* 1. (*ante* 187.) where a prohibition was moved for after sentence, because it appeared in the libel, that the word *whore* was spoken in *London*; but denied, for though the words appear to be spoken there, yet the custom does not appear: and though (said the court) we have such a private knowledge of it, that upon motions we do not put the party to produce an affidavit of it; yet we cannot judicially take notice of it. And agreeable to this is 5 *Mod.* 162. *Carth.* 75. *Salk.* 125. 243. *Mo.* 360. *Co. Lit.* 175. *b.* *Cro. Car.* 517. *Cro. Jac.* 69.

[1188]

Another,

Another, and we think also a proper answer, was likewise given, that if we could take notice of the custom, yet that extends only to the case of a sale, and not of a pawn. *Perk.* § 435. *Noy.* 28. 2 *Sid.* 139. *Lamb.* 619. 35 *H. 6.* 25. *Jenk. Cent.* 83.

It is a rule that all customs must be taken strictly and not extended to similar cases. 1 *Roll. Abr.* 567, 568. *Show.* 4. *Owen* 4. 2 *Leo.* 109. 208. 1 *Bulst.* 207. 2 *Roll. Abr.* 85. *pl.* 7. 2 *Inst.* 713. but here a pawn is not a similar case; sales in market overt are encouraged, because it is a circulation of property, whereas pawning is *pro tempore* a locking of it up.

There is no occasion to pray in aid of 1 *Jac.* 1. c. 21. in this case; though it was not immaterially argued from for the plaintiff. We are all of opinion, the plaintiff must have judgment.

Trinity Term

*16 Georgii 2. Regis. In B. R.

* 16 & 17. See
Burr. Sett. Ca.
220. pl. 75.
1 Will. Rep. 18.

Sir William Lee, *Knt. Chief Justice.*

Sir William Chapple, *Knt.*

Martin Wright, *Esq;*

Thomas Denifon, *Esq;*

} *Justices.*

Sir Dudley Ryder, *Knt. Attorney General.*

The Hon. William Murray, Solicitor General.

Taylor *vers.* Hall.

THE court held, that it was not actionable to say, the plaintiff *had* had the pox. For it is avoiding him for fear of contagion, and refusing to keep him company, that is the legal notion of damage; and when he is cured, those inconveniences will not attend him. And judgment was arrested (1).

Not actionable to say *A.* has had the pox.
Roll. Abr. 43.

(1) *Vide* in *Carlake v. Mapledoram*, S. P. acc. 2 Term Rep. 473.

Dominus Rex *vers.* Eyre, Clerk.

A Writ *de excommunicato capiendo* issued out of Chancery, which was opened and inrolled in B. R. but upon exceptions taken to it, the court made a rule upon the prosecutor and the delivery of it to the sheriff is staid by the defendant until the return is out, chancery may issue a second. It is good where it states the cause "to be on an appeal and complaint of nullity." So though the Judge is made a party, and condemned in costs. *Vide* 4 Com. Dig. Excommengement, (B. 1.) 106. (B. 4.) 109.

to

[1190]

to shew cause why the delivery out of the writ to the sheriff should not be staid: before an opportunity came of shewing cause, the return of the writ was out: and the prosecutor sued out a second writ *e Cancellaria*, and to prevent the loss of that, desired that the defendant might at once take his exceptions by a motion to quash.

The first exception was, that the former writ being inrolled in *B. R.* the Chancery could not issue a second writ, but by *5 Eliz. c. 23.* such second writ was to issue from *B. R.* To this it was answered, that the act related only to the case where the first writ had actually issued, and the sheriff had returned *non est inventus*; where the court can fine him if they see occasion, and issue *capias, alias, and pluries.* *Et per curiam,* The answer is right; if the first writ had been actually quashed, they must have gone to the Chancery for another.

Ante 422. 871.

Second exception, That it is said to be on an appeal and complaint of nullity: now from a nullity there lies no appeal. Answer, This is their form, which *Trin. 3 Geo. 1. Rex v. Elderton*, it was held we must have regard to; they lay words with an *aut consimilia*, which is allowed.

Third exception, The Judge is made a party and is condemned in costs. *Mo. 540. 1 Vent. 86.* Answer, In this case there could be no other, he *ex officio* excommunicates a man; that man appeals, and must make some body a party; there is no promoter, and therefore he cites the Judge: the superior jurisdiction is of opinion, he has done the man an injury, and why then should he not pay costs? Lord *Talbot* in his time, and Lord *Hardwicke* since, upon exceptions to the *significavit* held, it was proper to make him a party, and that he was liable to costs.

The court (after time taken to consider) discharged the rule for quashing, and ordered it to be inrolled, and delivered out to the sheriff.

Thrale *vers.* Vaughan.

On what bonds
there shall be
bail in error.
1 Will. 19. S. C.
Ante 476. 959.

THE condition of a bond was, that if the plaintiff furnished a third person's cellar with beer, the defendant would pay, not exceeding 100*l.* The defendant pleaded, that none was delivered: to which the plaintiff replied a delivery to the value of 80*l.* and the defendant demurred. And judgment was given for the plaintiff.

Of this judgment error was brought; and bail not being put in, execution was taken out. And now upon consideration of 3 Jac. 1. c. 8. where the words are, *Bonds for the payment of money only*, the court set aside the execution: for this is by no means a certain demand, but rests upon a *quantum meruit*; and the sum is only put into the replication, in order to assign a breach. And the act being to restrain a legal remedy, must be taken strictly (1). 1 Keb. 613. Carth. 28. 2 Bulst. 54. 1 Lev. 117.

[1191]

(1) That this stat. 3 Jac. Rep. 321. *Charvet v. Alfray*, c. 8. is to be construed liberally. 2 Burr. 746. *Vide Huddy et ux' v. Gifford, Com.*

Pitts *vers.* Carpenter.

ON a trial at Guildhall the plaintiff proved 4*l.* 15*s.* 3*d.* to be due to him: the defendant by a set-off discharged 3*l.* 2*s.* so the verdict was only for 1*l.* 13*s.* 3*d.* The defendant upon this moved on 3 Jac. 1. c. 15. and suggested both to be citizens of London, and prayed to be excused, and have costs: and relied on the case of *Hickman v. Colley*, ante 1120.

A set-off reducing the demand under 40*s.* does not affect the jurisdiction. 1 Will. 19. S. C.

But the court held, he was not intitled to the benefit of that act, though the damages were under 40*s.* for it is plain the real demand was above 40*s.* and how could the plaintiff tell, whether the defendant would set off any thing in that action, so as to be bound to chuse that jurisdiction. Besides, he has in effect recovered 4*l.* 15*s.* 3*d.* because a debt, which he must otherwise have paid, is now satisfied. Here are two causes determined, both of them of greater value than is within the inferior jurisdiction. The plaintiff had judgment for the 1*l.* 13*s.* 3*d.* and his costs (1).

(1) *Gros v. Fisher*, 3 Will. 48. *wife where no set-off, if the demand is reduced below 40*s.* Ante* S. P. in C. B. adm. *Fitzpatrick v. Pickering*, 2 Will. 68. *Benson* 1120, &c. *v. Hemming, Barnes* 353. *Other-*

Yeo and Leman.

EJECTMENT being brought on a re-entry for non-payment of rent, the defendant moved to stay the proceedings, on payment of arrears and costs. In the account before the

The tenant shall not deduct land-tax to the improved value in account with his landlord.

the master a difficulty arose about the proportion of land-tax to be allowed, as to which the case was: that the premises were let at 120*l.* per annum, but by improvements were of more value; and since those improvements, were taxed at 150*l.* per annum. The tenant would have deducted the whole land-tax. But the court held, that the landlord ought only to allow the proportion which 120*l.* bears to 150*l.* upon the whole.

Olivant *vers.* Perineau.

No bringing
goods into court
in trover.
1 Will. 23, S.C.
Ante 822.

[1192]

IN trover for pictures, the court refused to let the defendant bring them into court. For the action is not for the thing, but damages; and they may not now be in as good a condition as they were before. *Salk.* 597. A case of *Blackborne v. Freeman* was cited, where a rule was taken for bringing in a watch-chain; but in fact the court said the motion was denied (1).

(1) *Buxton v. Gabell*, B. R. 1 Will. 33. *Harding v. Wilkins*, Say. 120. B. R. S. P. *Sed vide Tuncy v. Clerk*, *Caf. of Prac. C. B.* 69. *Cook v. Helgate*, *ib.* 130. *Prac. Reg.* 260. in C. B. *Cattling v. Bowling*, Say. 80. *Fisher v. Price*, 3 Burr. 1364. in B. R. *contra*. In which last it is laid down that goods may be brought into court in trover. When it is brought for a specific chattel of an ascertained quantity and quali-

ty, and the case is unattended with any circumstances that can enhance the damages over the real worth, but that its real and ascertained value must be the sole measure of the damages. *Ib.* 1364. But the plaintiff may still elect to proceed for special damages at the peril of costs. *Ib.* 1365. *Whiters v. Fuller* in C. B. *Black, Rep.* 902. *Vide Anon.* ante 131. and the cases there cited.

Long *vers.* Miller.

Practice as to
pleas in abate-
ment.
1 Will. 23, S.C.

WHEN the rules to plead ran for eight days, the course of the court was to allow the four first only for pleas in abatement: but as to pleas in chief, it was sufficient if they came in at any time before judgment signed. In *Trin. 6 Geo. 2.* the time for pleading was shortened to four days, but no provision for any distinction between the two sorts of pleas. In the present case the rule was given the 7th of May, which expired the 11th: and (no judgment being signed) the defendant on the 16th put in a plea in abatement; notwithstanding which the plaintiff signed his judgment. And *per curiam*, He had a right so to do. Whilst the eight days rule stood, the plaintiff was not obliged to regard a plea in abatement, that did not come in within

within the four days; but might sign his judgment, as if there was no plea at all. *Style's Pr. Reg.* 369. 1 *Lill.* 2. Now when we shortened the general time of pleading, can it be imagined we intended to enlarge it as to dilatories? They still stand upon the strict rule of the court, and must come in within the four days, and cannot be received after, as pleas in chief may (1).

Cases in Holt's time 534.

(1) *Vide Anderson v. Baddislade*, the cases there cited, and *Sunday* 1268. *Biddleton v. Atcherley*, is counted as one, unless it be the fourth day, when it may be filed on the fifth. *Lee v. Carleton*, 63. and the four days are both inclusive. *Jennings & al'* 3 *Term Rep.* 642. *Harbord v. Webb*, 1 *Term Rep.* 277. and *Perigal*, 5 *Term Rep.* 210. S. P.

Catlin *vers.* Catlin. :-

IT was held, that upon a proper affidavit the writ may be marked for bail in trover, without the order of the court, or of a Judge at his chambers; for it is more an action of property, than a tort. 6 *Mod.* 14. *Trin.* 11 *Geo.* 2. *Pitts v. Meller* in B. R. (1).

Special bail in trover without a Judge's order. 1 *Wils.* 23. S. C.

(1) *Adm. Lumley v. Quaree*, 2 *Ld. Raym.* 767. *Emerson v. Hawkins*, 1 *Wils.* 335. *Charter v. Jaques*, *Cowp.* 529.

Case of the Lecturer of St. Anne's Westminster.

THE court (upon consideration) refused to grant a *mandamus* to the bishop of London to grant licence to a lecturer, who appeared to have no fixed salary, but to depend altogether on voluntary contributions; and where there was no custom, and the rector had refused his leave to preach in the church to the person now applying (1). *Vide Cases in Holt's time* 433.

No *mandamus* for a lecturer. 1 *Wils.* 11. S. C. much fuller.

(1) *Vide Rex v. Bishop of London*, 1 *Term Rep.* 331. *Rex v. Field*, 4 *Term Rep.* 125.

Dominus Rex *vers.* Grosvenor.

[1193]

HE was one of the dissenters who was chosen sheriff of London and Middlesex, and refused to take upon him the office: for which an information was moved for against him, as

No information for refusing the office of sheriff. 1 *Wils.* 18. S. C.

it is an office in which the publick are interested, and therefore not to be compensated by a pecuniary satisfaction to the city. But upon shewing cause, the court discharged the rule, it appearing there were acts of common-council that had provided penalties upon refusers, which is the proper remedy; especially where it is *in dubio*, whether the refusal is a crime or not, which has never yet been settled. In this case the facts are agreed, and the only doubt is in point of law (1); and therefore more proper for a civil suit: and so was the opinion of the court in the case of *Shakleton of York* (a) in Lord *Hardwicke's* time. However they declared, that if after the point was determined against the dissenters, others should refuse; it might be a foundation to ask for an information,

(a) Rep. Andr.
201. n. * but
not S. P.

(1) *Vide Guildford Town v. Clarke*, 2 Vent. 247. *Larwood's* case, 1 Ld. Raym. 29. 4 Mod. 269. and it has been determined that dissenters are not eligible by law to serve the office of sheriff, and therefore are not liable to a fine imposed by a bye-law of the corporation in case of refusal. *Harrison Chamberlain of London v. Evans*, 2 Burn's Eccl. Law 157. 6 Bro. P. C. 181. Cowp. 536.

Between the Parishes of Deddington and Dunfrew.

A certificate-man gains a settlement by purchase.
Burr. Sett. Ca. 220. S. C.

Ante 163.

Ante 1116.

A Certificate-man purchased a house for 42*l.* lived in it many years, then sold it, and becoming chargeable was sent back. It was insisted, that 9 & 10 W. 3. c. 11. saying, "A certificate-man shall gain a settlement by no act whatsoever, unless the taking 10*l.* per annum, or serving an annual office;" this man, notwithstanding the purchase, might be sent back: and it was said to differ from the case of *Burclow v. Eastwoodhay*, Pasch. 5 Geo. 1. where the surrender of a copyhold to the certificate-man's wife was held to gain him a settlement; because there it was not his own act, (as this purchase is) but it came to him by operation of law. The court did not think this a sufficient distinction, and said a purchase was in its nature an excepted case; and his selling it afterwards made no alteration, as was held *Trin. 12 Geo. 2.* between *Saint Neots* and *Saint Cleer* (1).

This also, as to a purchase by a certificate-man, was held the last term in the case of the parish of *Stansfield*. Burr. Rep. S. C. 205. 1 Sess. Ca. 396. No. 316.

(1) *Rex v. West Shefford*, Burr. S. C. 307. *Rex v. Widdington*, Doug. 738. accord.

Barclay *vers.* Earle.

THE defendant being sued by original, and arrested upon a special *capias*, cast an *essoin* with the clerk; and for want of the plaintiff's adjourning it, signed a *non prof.* The plaintiff took no notice of this, but delivered his declaration, and after the rule to plead was out, and a plea called for, signed his judgment.

Essoin lies not on a *capias* to arrest, and plaintiff may go on notwithstanding an irregular *non prof.* is signed.

This was moved to be set aside, though little could be said to support the legality of casting an *essoin* on the special *capias*, where the sheriff is not to summon, but arrest the party (1). But what was principally relied on was, that after a *non prof.* signed, the plaintiff was out of court, as to all purposes but moving to set it aside, and therefore could not sign his judgment, but was irregular in that respect. But the court (considering it a trick) declared, that as there was no colour for the *essoin*, to expect a plaintiff to search after a *non prof.* and there was no notice given of it; the plaintiff was right to go on: and therefore they refused to set aside the judgment.

(1) It is now settled that there can be no *essoin* in a personal action. *Argent v. Dean and Chapin of St. Paul's*, E. 23 Geo. 3. *Ellen's Prac.* 7. *Symonds v. Mayor of Tamesh, Co. Cas. Prac.* 8. *Anon. v. Jefferson*, 2 *Wils.* 164 *contra*.

But in proceedings against peers and members of parliament where the process is by summons and distress, it is still allowed. *Rooks v. Earl of Leicester*, 2 *Term Rep.* 16.

Goddard *vers.* Cox. In Middlesex.

SAMUEL Owen was indebted to the plaintiff for coals. He died, and made his wife executrix. She continued to deal with the plaintiff, and received coals on her own account; then she married the defendant, who also received coals on his own account, and made several payments generally upon account. These payments, if applied to the debt from the executrix, and the debt whilst a widow, cleared both those accounts, and the present action was against the defendant only, for what was delivered in his time. And the question was, who had the right

Who has the power of applying payments. (1) Ante 24. and Bull. L. N. P. 174.

(1) In *Hawkins v. Rawlins*, N. P. 174. *Gillb. Law of Evid.* 24. *Anon. Cro. Eliz.* 68. 3 ed. 177. 16 *Vin. Abr.* 277. 8 *Mod.* 236. S. P. Bull. L.

of applying these payments, there being no direction from the defendant, who it was agreed had the first right. And the Chief Justice held, that thereby it devolved to the plaintiff. And the defendant being by the marriage equally a debtor for what his wife received *dum sola*, as for what was after; the plaintiff might apply the money received to discharge the wife's own debt: but as to the demand against her as executrix, the validity of which depended on the question of assets, and manner of administering them; he was of opinion, the plaintiff could not apply any of the money paid by the defendant to the discharge of that demand.

[1195]

A case was mentioned to have been before the Chief Justice at *Suffolk* assizes in 1730, between *Bloss* and *Cutting*, where the defendant owed money on two bonds, and paid money on account, but gave no directions which he would have it applied to; and upon a case reserved, it was determined, that the plaintiff had the election.

Bishop *vers.* Chitty. At Guildhall.

An acceptance to pay at a goldsmith's must be tendered within the same time that a note must.

CASE by indorsee of a bill of exchange against defendant acceptor, who on tender of the bill wrote, "Messieurs *Capwall* and *Mount*, pay this bill when due for *Thomas Chitty*. The bill fell due 2 *January* 1741, the bankers paid till the 19th at two, and 21st *January* the money was demanded of defendant.

For the defendant it was insisted, that the plaintiff had given such a credit to the bankers, as to make it his loss; and they compared it to the common case of a note or draft kept.

For the plaintiff it was said, that there was no limited time but that of the statute of limitations, to sue the acceptor; and that the plaintiff cannot come in as a creditor of the goldsmiths because they have done nothing to make themselves liable.

The Chief Justice held, that it was the loss of the plaintiff who though he might have refused to take such an acceptance yet had now agreed to it: and it was to all purposes in the nature of a draft, which is always considered as actual payment when a reasonable time to receive it in is elapsed (1).

(1) *Smith v. De la Fontane*, B. R. T. 25 Geo. 3. *Bayley* in *Append.* No. 5. *vide contra*.

Michaelmas Term

17 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir William Chapple, *Knt.*

Martin Wright, *Esq;*

Thomas Denison, *Esq;*

} *Justices.*

Sir Dudley Ryder, *Knt. Attorney General.*

The Hon. William Murray, *Solicitor General.*

Dominus Rex vers. Dawbeny.

TWO sets of churchwardens were sworn in for the parish of Sampford Peverel in Devon; and the court refused to grant any information in the nature of a *quo warranto*, but left them to settle the right in an action (1).

No *quo warranto*
for office of
churchwarden.
1 Bott by Const
288. pl. 326.
S. C. more full.

(1) *Rex v. Shepherd*, 4 *Term Rep.* 381. S. P. upon the authority of this case.

Graham vers. Benton.

ON a motion to discharge the defendant out of execution, as being a bankrupt, on the statute 5 *Geo. 2. c. 30.* it appeared that the debt was contracted before the bankruptcy, and sued for and recovered pending the commission, and before any certificate obtained, and the judgment was afterwards affirmed on error, and costs given on such affirmation.

Bankrupt.
1 Will. 41. S. C.
MSS. S. C.

Q q 2

And

And the court discharged him as to all; for not having his certificate, he could not plead to the action: and these costs were attendant upon the original judgment; and cannot be considered as given for delay of execution, when it appears there ought to have been no execution, though no writ of error had been brought (1).

(1) *Palmby v. Masters, Barnes* 368. *Calcraft v. Sawann, ib.* 204. *Aylett v. Harford, 2 Black.* 1317. *Blondford & al' v. Foote, Cowp.* 138. *Lewis v. Piercy, H. Black. Rep.* 29. *Langford v. Ellis, Cook's Bank. Laws* 232. 3d ed. But a bankrupt executor pleading a false plea after the commission issued, is liable to execution for the costs. For the debt arises from his pleading the false plea, and is therefore subsequent to the commission. *Howard v. Femmet, 3 Burr.* 1378. *1 Black. 400. S. C. The 5 Geo. 2. c. 30.* extends only to the person, not to executions against the bankrupt's goods. *Callen v. Mynrick, 1 Term Rep.* 361.

Newcombe vers. Green.

Fees amended by the Judge's notes.

3 Will. 33. S. C.

IN covenant the breach was assigned in non-payment of 270*l.* mortgage-money. And on the trial the jury gave a verdict for 274*l.* 11*s.* damages: and Mr. Justice *Burnet* entered it so in his minutes, but the clerk of *nisi prius* had only marked 1*s.* damages on the *disfringas*.

The court was now moved, to alter the indorsement, by making it agreeable to the Judge's notes. And Mr. Justice *Denison* having conferred with him, and reporting the matter to be as above stated, the court ordered it to be amended accordingly (1).

(1) *Vide Eddowes v. Hopkins, Mayo v. Archer, ante* 513. *Pai Doug.* 361. *Aple v. Grant, ib.* v. *Bois, 1 Lev.* 134. *Do: v. Per- 703. Taylor v. Whitehead, ib.* kens. 3 *Term Rep.* 749. *William 718. Eliot v. Skyp, Cro. Car.* v. *Jones, Barnes* 6. *Husky 338. Bala's case, Salk.* 53. *tam v. Smith, ib.* 449.

Dyson vers. Ironmonger et Ux'.

Where a party is ordered to attend the court, the court permitted counsel to examine him, but would not swear him.

ON a complaint against one *Stanton*, for serving a writ where the plaintiff had disowned employing any body: a rule was made upon *Stanton*, to answer the matters in the affidavit, and at the same time attend the court in person. Upon his attendance, and reading his affidavit, I desired leave to ask him

(1) *Bu*
arred a
ng from
not have
Cook v.

some questions on behalf of the defendants, which the court allowed me to do; but would not swear him to answer such questions.

Everall *vers.* Smalley.

IN ejectment, a case was stated, that by the custom of the manor of *Collingham* a tenant in tail of a copyhold might surrender the same, and bar his issue, without suffering a recovery; and that by the same custom a recovery might be suffered in the manor court, and have the same effect. The lessor of the plaintiff in this case claimed under a bare surrender: and it was objected, that the custom to bar by surrender could only be supported *ex necessitate*, where there was no other way; whereas here it could be done by recovery, and therefore no necessity appeared. *Sed per curiam*, There is no case to warrant any such distinction, and there is nothing unreasonable in allowing two ways of alienating estates; the customs are both of equal antiquity, and we cannot prefer one to the other. The surrender is the most natural way, and the cheapest. The *posse* must be delivered to the plaintiff.

Custom to bar entails of copyholds by recovery or surrender good (1)
1 Will. 26. S. C.

[1198]

(1) *Doe v. Truby*, 2 Black. Rep. 944. S. P.

Mitford, Executor, *vers.* Cordwell.

THE plaintiff's testator obtained judgment, which after his death was revived by two *scire facias*'s with *nichils* returned (1); and the defendant being taken in execution, moved to be discharged, upon producing a release from the testator, and a rule was made for the plaintiff to shew cause.

Audita querela must be brought, where the case is doubtful.

Upon shewing cause it appeared very doubtful, whether the release was executed by the testator: and thereupon I insisted, that though when the *scire facias* is not served, the court will in a clear case relieve the party upon motion (2); and not put him to bring his *audita querela*: yet they will never do it, where the

(1) But if the sheriff had returned a *scire feci*, the release being from the testator, he could not have had an *audita querela*.
Coke v. Berry, 1 Will. 98. *Vide*

2 *Crompt. Prac.* 439. 1 *Com. Dig. Audita Querela*, (C.) 649.

(2) *Wharton v. Richardson*, ante 1075.

fact is disputed. And so the court agreed, but then they would have had the plaintiff consent to try it in a feigned issue, the defendant lying actually in execution; which the plaintiff, who was an executrix in trust, refusing to consent to, the court refused to do any thing upon the motion, and left the defendant to his *audidita querela*.

White *vers.* The Earl of Montgomery.

Where a bond is in the hands of a third person, the court will oblige him to give *oyer* and produce it.

IN debt upon bond the defendant craved *oyer*, which the plaintiff was not able to give him, the bond being in the hands of Mr. *Strickland*, a gentleman of the bar, who had refused to produce it, and enable the plaintiff to force the defendant to plead. And the court being moved against Mr. *Strickland*, his excuse was, that the bond was left with him to wait the event of a suit still depending. *Et per curiam*, That is a matter the defendant may avail himself of by plea, and we will not determine it upon motion: there must be a rule on Mr. *Strickland* to give *oyer* of the bond (1), and produce it at the trial, if required by the plaintiff.

(1) Like rule where the deed *E. 27 Geo. 3 B. R. 3 Term Rep.* was tortiously in the hands of the 153. defendant. *Mattison v. Atkinson*,

Dominus Rex *vers.* The Inhabitants of Madley in Staffordshire.

Costs are not to be paid where any material part of an order is quashed.

Burr. S. C. 202. But not S. P. S. C.

A Man, his wife and daughter were removed by order of two justices of the peace, which upon appeal was confirmed, and being removed by *certiorari* into the King's Bench, was there quashed as to the daughter, her age not being stated, nor the place adjudged to be the place of her settlement; but as to the man and his wife the orders were confirmed.

[1199]

(a) Rep. Burr. S. C. 194. but no such determination.

It then became a question upon the statute 5 Geo. 2. c. 19. (1) whether costs should be paid. And a case was cited of the inhabitants of *Great Chart*, (a) *Mich. 16 Geo. 2.* where the court affirmed the order of sessions as to the point of the appeal, but quashed a reservation in the same order as to costs in case of a new removal; and it was determined, that the prosecutor of the *certiorari* should pay costs.

Sed per curiam, That is a very different case from this, for there the party could not be affected by the part of the order which

which was quashed, till the sessions had made an actual order about the costs; and the bringing it up for the purpose of quashing that part was unnecessary, and consequently vexatious, which is the true test to go by. Whereas here the parish who brought the *certiorari* were unjustly burthened with the daughter, and had no other remedy but to come here. And the Parliament never intended to punish them for taking a legal remedy against a *gravamen*. Upon writs of error there are no costs, if execution was taken out before. In this case therefore the recognizance given on bringing the *certiorari* must be discharged (1).

(1) *Rex v. Hitcham*, Burr. S. C. 504. *Rex v. Bray*, ib. 687. acc. So where a case is sent down by B. R. to be re-stated, and the prosecutor upon such re-statement finds the ground of his appeal done away, and abandons it, his recognizance for the costs shall be discharged. But if he litigates the amended case, and the decision is against him, it shall not. *Rex v. Edgeworth*, 4 Term Rep. 218.

Between the Parishes of Wingham and Sellindge in Kent.

IT was stated in a special order, that a certificate-man, having notice that he was appointed borsholder, never took the oath of office, but once executed a warrant of a justice directed to the borsholder. And this the sessions determined to be gaining a settlement within the 9 & 10 W. 3. c. 11. *Sed per curiam*, The order must be quashed, for the words of the act are, "being legally placed in such office," that is, being the officer both *de facto* and *de jure*, which this man was not, the order stating negatively, that he was not legally placed therein, which can only be by an appointment and swearing in (1).

A certificate-man must be sworn into an office else he gains no settlement by executing it. Burr. Sett. Ca. 223. more perfect, S. C.

(1) It was also stated negatively, "that there was no presentment of jury of the leet." *Vide Rex v. Winterbourne*, Burr. S. C. 520. *Bl. Rep.* 452.

Green *vers.* Brown. At Guildhall.

THE ship *Charming Peggy* was insured in 1739, from North Carolina to London, with a warranty against captures and seizures. And in an action the loss was laid to be by sinking at sea. All the evidence given was, that she failed out of port on her intended voyage, and has never since been heard of. And

A ship never heard of is presumed to be foundered at sea.

several witnesses proved, that in such a case the presumption is, that she foundered at sea, all other sort of losses being generally heard of. The underwriter insisted, that as captures and seizures were excepted, it lay upon the assured to prove the loss happened in the particular manner declared on. But the Chief Justice said, it would be unreasonable to expect certain evidence of such a loss, as where every body on board is presumed to be drowned; and all that can be required is the best proof the nature of the case admits of, which the plaintiff has given; he therefore left it to the jury, who found the loss according to the plaintiff's declaration (1).

(1) *Newby v. Read*, Sit. after Mich. 3 Geo. 3. S. P. *Park on Mar. Ins.* 63. *quod vide.*

Underwood *vers.* Parks, At Middlesex Sittings.

The truth of words cannot be given in evidence on Not guilty,

IN an action for words, the defendant pleaded Not guilty, and offered to prove the words to be true, in mitigation of damages: which the Chief Justice refused to permit, saying that at a meeting of all the Judges upon a case that arose in the Common Pleas, a large majority of them had determined, not to allow it for the future, but that it should be pleaded, whereby the plaintiff might be prepared to defend himself, as well as to prove the speaking of the words. That this was now a general rule amongst them all, which no Judge would think himself at liberty to depart from, and that it extended to all sort of words, and not barely to such as imported a charge of felony (1).

(1) *Dennis v. Pawling*, coram Price B. at Bodmyn, Trin. vac. 1716. S. P. 12 Vin. 150. pl. 16. Where the words imported a charge of felony. *Vide Smith v. Richardson*, Barnes 195. Com. Rep. 551. *Prac. Reg.* 383. S. C. S. P. So where the words import a general charge of crimes not capital, the truth cannot be given in evidence in mitigation. *Bishop of Sarum v. Nash*, per Parker C. J. Bull. L. N. P. 9. But it has been held prior to the present case, that where the charge is of a par-

ticular and specified criminal act not capital, the defendant may give the truth of it in evidence. *Smithies v. Harrison*, per Holt C. J. 1 *Ld. Raym.* 727. And where the words charged impute a capital crime, if the plaintiff gives evidence of other expressions to the same purport in aggravation, the defendant may in mitigation, give evidence that these last are true for he had no opportunity to plead it. *Collison v. Loder*, Oxon. 1790. Per Burnett J. Bull. L. N. P. 10.

Hilary Term

17 Georgii 2 Regis. In B. R.

Sir William Lee, Knt. Chief Justice.

Sir William Chapple, Knt.

Martin Wright, Esq;

Thomas Denison, Esq;

} *Justices.*

Sir Dudley Ryder, Knt. Attorney General.

The Hon. William Murray, Solicitor General.

Wilson, on the Demise of Eyre, Clerk, *vers.* Carter et al'.

THE lessor of the plaintiff, being a prebendary of *Sarum*, brought an ejectment to avoid a lease made by his predecessor, as not being conformable to the proviso in 32 H. 8. c. 28. § 2. which requires, that upon renewals the old lease must be expired, surrendered, or ended, within one year next after making of the new lease. And his objection was, that the surrender made of the former lease was with a condition, that if the then prebendary did not within a week after grant a new lease for three lives, the surrender should be void; whereby (as was contended for the plaintiff) the old term was not absolutely gone, but the lessee reserved a power of setting it up again. But the court after two arguments, gave judgment for the defendants: this being within the intent of the statute, which was that there should not be two long leases standing out against the successor. Here the new lease was made within the week, and from thence it became an absolute surrender both in deed and in law. And the whole was out of the lessee, without further act to be done by him. In the proviso there is the word *ended* as well as *surrendered*,

Conditional surrender of a prebend's lease good to warrant a renewal.

2 Burn's Eccl.

L. 333.

3 Bac. Abr. 345.

rendered, and can any body say the first lease is not at an end? This was no more than a reasonable caution in the first lessee, to keep some hold of his old estate, till a new title was made him,

Dominus Rex vers. Bestland.

No *certiorari* for defendant to Judges of assize. Ante 877. and the cases in the note.

THE court refused to grant the defendant a *certiorari* to remove an indictment for a misdemeanor from *Dorset* assizes.

Rivet et al' vers. Cholmondley et al'.

Plaintiff may amend the *venue*.

UPON the authority of *Stroud v. Tilley*, (*ante* 1162.) the court suffered the plaintiff to amend the *venue*, after the defendant had changed it upon the common affidavit (1).

(1) *Vide Cowp.* 409.

Lord Vane's Case.

The court will not inquire into the truth of articles of the peace.

But the court may review them after security has been ordered upon them, and hear objections arising upon their face.

HIS lady exhibited articles of the peace against him, and was ordered security upon them: when my lord came into court, Mr. *Lloyd* desired the articles might be read, and insisted they were no ground for demanding security; or if they were, yet the fact of a separation under articles, upon which the complaint was grounded was false, and he offered to prove it so.

Strange contra, opposed going into any such inquiry, it having never been done: and the course of the law had been, to give that credit to the oath of the party, as to order security immediately upon it; mentioning also the inconvenience in opening a door for vying and re-vying on such occasions. He admitted, that the court might properly review the articles, and hear any objections arising on the face of them.

Et per curiam, That is all we can do, the other never was attempted before, and we must preserve the course of the court by taking the articles to be true. Upon the review the court was of opinion, the facts as stated required security. And it was given accordingly.

Dominus Rex *vers.* Dr. Bridgeman.

A Rule being made for him to shew cause, why an information in nature of a *quo warranto* should not be granted, to shew by what authority he claimed to hold a court-leet in the borough of *Wigan* in *Lancashire*: he moved for the common rule to inspect the books of the corporation, who were the prosecutors, and it was granted. But upon special motion it was afterwards discharged, this being a matter of a private claim between the defendant and the corporation; and if this should prevail, one private man would have as good a right to inspect the deeds and evidences of another (1).

No rule to inspect books on claim of right to hold a leet.

(1) *Vide* *Hodges v. Atkis*, 3 466. pl. 11. *Wood v. Davis*, 1 Wils. 398. *Cox v. Copping*, Wils. 104. *Rex v. Fraternity of* 5 Mod. 395. 1 *Ld. Raym.* 337. *Hofimen*, post. 1223. and the note. *Turner v. Gebin*, 12 Vin. Ab.

*Dutby vers. Tito et al.**Tito vers. Dutby.*

IN both causes the verdict was for the defendants. And now *Tito* one of the defendants in the first cause moved, that the costs he was to pay to *Dutby* in the second cause might be set against the costs *Dutby* was to pay in the first.

Costs cannot be set against costs.

Sed per curiam, It cannot be done, there was forced to be an act of Parliament in the case of mutual debts: besides, how can we prefer *Tito*, who is but one defendant out of five, when the plaintiff in that action may pay the costs to either of the others (1).

(1) *Powell v. Smith*, Bull. L. N. P. 336. *Goodtitle* on the demise of *Clewlow v. Lowe*, Barnes 130. *Ford v. Miles*, cited *ib.* 131. acc. But the law seems now settled to be otherwise. *Scoffin v. Robinson*, Barnes 145. *Roberts v. Biggs*, Barnes 146. Bull. L. N. P. 336. S. C. *Trustout ex dem. Barnes v. Crafter*, 2 Black. 826. *Nunex v. Modig-*

iani, H. Black. 217. *O'Connor v. Murphy*, H. Black. 657. Though these are cases decided in C. B. yet it appears from *Mitchell v. Oldfield*, 4 Term Rep. 123. that the same rule is adopted in B. R. But the practice of the two courts with respect to allowing the attorney a paramount lien, for his bill of costs differs. In C. B. they permit costs

costs in cross actions to a set-off against each other without any regard to this Hen. *Roberts v. Mackoul*, *Say. Costs* 254. Cited 2 *Black.* 827. *Nunez v. Modigliani*, 1 *H. Black.* 217. *Schoole v. Noble*, *ib.* 23. But in *B. R.* the

costs and debt recovered in one action can only be set off against those obtained in another after a deduction of the attorney's bill for his costs in the latter suit. *Mitchell v. Oldfield*, 4 *Term Rep.* 123.

Dominus Rex vers. Chetwynd.

Where on an indictment for murder the prisoner pleads the King's pardon before conviction, the court will not require bail for his appearance to answer an appeal under 3 H. 7. c. 1.

They will not require him to give securities for his good behaviour under 5 & 6 W. & M. c. 13. unless he appear to be a person of ill fame. See the trial in *St. Tr.* ix. 517.

A Special verdict on an indictment for murder was found at the *Old Bailey*, and removed into the King's Bench. But before argument the defendant obtained his Majesty's pardon, which he pleaded upon his knees, and it was allowed. Then the counsel for the prosecutor insisted, that by virtue of 3 H. 7. c. 1. the court ought to require bail for his appearance to answer an appeal; there being an affidavit produced, that the brother and heir was beyond sea, but expected in time: and it was also insisted, that by virtue of 5 & 6 W. & M. c. 13. the court should take security for the good behaviour.

[1204]

The statute 3 H. 7. c. 1. runs, "That if any person charged as principal or accessory be acquitted at the King's suit within the year and day; the justices before whom he is acquitted shall not suffer him to go at large, but either remit him again to the prison, or else let him to bail, after their discretion, till the year and day be past."

Upon this clause it was argued, that the case of pleading a pardon after a special verdict was stronger than the case of an acquittal by jury; which took away all the presumption of guilt. And that this was an actual acquittal, and is called so in the pardon. The judgment is, *quod eat inde sine die*, and if he is again indicted, he may plead *afterfoits acquitte*. 11 H. 4. 41. *Br. Corone* 29. 133. *F. N. B.* 251. G. And the record being moved into the King's Bench, this court are the Justices before whom he is acquitted: and it is not discretionary only as to the point between bail or imprisonment, the latter of which the prosecutor did not insist upon.

Slaughterford was acquitted before *Holt* at *Surrey* offices, and he took bail

to answer an appeal, which was afterwards tried at bar, and the party convicted and hanged. See his case in *St. Tr.* ix. 543. in notes. [Ante 402. 855. 858.]

But as to this point, the court were of opinion, that the present case was not such as the act of Parliament meant; and this being

being to subject the prisoner to a second trial, which before he was not, he not being indictable till the time to appeal was elapsed, till this act gave such a prosecution; it was therefore to be construed strictly, and confined literally to an acquittal by verdict (*Kelyng* 104.) upon an arraignment at the King's suit; and it was material, that no instance could be shewn of requiring such bail upon pleading a pardon; on the contrary *Bowen* in *Mich. 8 Ann.* was discharged without bail. *Acquittal* they said must be understood, in a course of law, and not an interposition of the crown's mercy.

The other point as to sureties for the good behaviour depended on the 5 & 6 W. & M. c. 13. which enacts, "That the justices before whom any pardon for felony shall be pleaded, may at their discretion remand or commit the person pleading it to prison, till he shall enter into a recognizance with two sureties for his good behaviour for any time not exceeding seven years, and if the party be an infant (which was the present case) then he is not to be bound, but must find sureties." Upon this clause therefore the prosecutor insisted upon sureties for the good behaviour, and instanced 2 H. H. P. C. 394. where it is said, that at common law, without the aid of 18 Eliz. c. 7. a party acquitted may be bound to his good behaviour, if of ill fame.

The counsel for the prisoner did not much oppose giving sureties, and said they had them ready. And Mr. J. *Wright* and Mr. J. *Dentifon* were inclined to take them. But as there had yet been no instance since the act, and this was merely discretionary, the Chief Justice was unwilling to make the precedent in the case of an infant, where some favourable circumstances were stated in the verdict. And the case *Hale* cites out of *Rassal's Entr.* was where (as the record says) *testatum fuit cur' per fidedignos*, that the defendant was of ill fame; and at last the others came in, to discharge him without security.

[1205]

N. B. I, on behalf of the prosecutor, (the heir being beyond sea) desired it might be taken notice of, that we did not waive our demand: and upon that the court said, it should be their own act, upon the discretion of the court.

Easter Term

17 Georgii 2 Regis. In B. R.

Sir William Lee, Knt. Chief Justice.

Sir William Chapple, Knt.

Martin Wright, Esq;

Thomas Denison, Esq;

} *Justices.*

Sir Dudley Ryder, Knt. Attorney General.

The Hon. William Murray, Solicitor General.

Real et al' *vers.* Macky.

Foreigner not
obliged to give
security for costs.

THE plaintiffs were *Swedes*, and brought an action for freight: and I moved to stay their proceedings, till they should give security for costs, as is done where in ejectment the lessor of the plaintiff is an infant (1). *Sed per curiam*, This has never been carried further than actions *qui tam* (2); and it may affect trade, in shutting up our courts from foreigners, who perhaps cannot find security in a strange country. The cases in ejectment are considered as more under the power of the court than other proceedings (3), and therefore we stay a second till

(1) *Noke v. Windham*, ante 694.

(2) *Vat qui tam v. Green*, ante 696.

(3) *Vide* the cases cited in the note to *Vat qui tam v. Green*, ut

the costs are paid of the first (4), which we cannot do in other cases (5). There was no rule made (6).

(4) *Vide Short v. King*, ante *Wilf.* 206. *Nuncomar v. Burdett*, *Cowp.* 158. In *Maxwell v. Mayor*, 2 *Burr.* 1026. *Boswell v. Irish*, 4 *Burr.* 2105. *Golding qui tam v. Barlow*, *Cowp.* 24. and the court have in these cases always stated the practice to depend upon numberless authorities. In later cases however *B. R.* has resolved to stay the proceedings when the plaintiff resides abroad, whether he be a foreigner or native. *Pray v. Edie*, 1 *Term Rep.* 267. *Fitzgerald v. Whitmore*, *ib.* 362. *Doe on dem. Selby v. Alton*, *ib.* 491. *De La Prouve v. Le Duc de Biron*, 4 *Term Rep.* 697. In this latter case the court has said that the defendant can not require this security until he has put in bail, but it does not appear from any printed authority that I have been able to meet with, that *B. R.* will exact this security from a foreigner who is plaintiff and resides within this kingdom. And the court of *C. B.* will not compel a plaintiff to give security for costs solely upon the reason of residence abroad, or being a foreigner if he dwell here. *Parquot v. Eling*, 1 *H. Black.* 106. *Forriem v. Carter*, *ibid.*

(5) *Knock v. Wilkins*, 2 *Kely.* 62. *Chapman v. Brown*, *ibid.* 163. *Englsh qui tam v. Cox*, *Cowp.* 322. In *B. R. Lazarus v. Pritchard*, *Barnes* 126. in *C. B.*—But it seems settled that both courts will stay proceedings in a second action until the costs have been paid in a former one, if it appears the merits of the case have been fully tried therein, and the second is manifestly vexatious. *Hacker v. Newborn*, *Sty.* 413. *Lord Byron's case*, 1 *Vent.* 100. *Anon.* 2 *Lord Raym.* 1308. *Weston v. Withers*, 2 *Term Rep.* 511. *Monkton qui tam v. Bingham*, *ib. n. a.* *Baldwyn v. Richards* in *B. R. Grovenor v. Cape*, *Say. L. of Costs* 245. cited 3 *Wilf.* 140. 2 *Black. Rep.* 741. *Mitchell v. the Executors of Halsky*, 2 *Wilf.* 149. 2 *Black.* 741. *S. C.*

(6) It does not appear here whether the plaintiffs were resident abroad or in this country. But it has been held that foreigners shall not be obliged to give security for costs, although they do reside beyond the jurisdiction of our courts. *Carr v. Skurp*, cited 2 *Black.* 1742. *Lamii v. Sewel*, 1 *ibid.*

Between the Parishes of Beccles and Leowstoft in Suffolk.

[1207]

THE pauper was hired to a blacksmith for a year at 3 *l.* per annum, to be paid when wanted by the servant. During the year the master gave him leave to work with another smith for three days, with another for a week, and with a third for a fortnight, and agreed the servant should have the advantage of it; after which he returned and staid out the year, and the master by his consent deducted the proportion of wages for the time he was away: and upon this state of the case the sessions held no settlement was gained, the first contract being dissolved. *Sed per curiam*, 'The order must be quashed, for this is not a dissolution of the contract, but a licence to be absent; and both parties considered

Absence of servant by the master's permission does not prevent a settlement. *Burr. Set. Ca.* 230. *S. C.* Ante 423. and the note. Post 1232.

sidered it so, by continuing together to the end of the year; the accelerating the payment of wages for the convenience of the servant, which is usually done, without a particular agreement, makes no alteration.

Cafe of the Rector of Wigan.

*Mandamus to
burgesses to at-
tend court-leet
to make a jury.
Wilf. 76. S. C.*

HE claimed as lord of the manor to hold a court-leet, at which the in-burgesses of *Wigan* ought to attend to make a jury, which they having refused and neglected to do at two courts, whereby no business could be done, the court granted a *mandamus* to enforce their attendance (1).

(1) So also to a jury of a leet tenures. *Rex v. Lord Montacute*, 1 *Black. Rep.* 60. 1 *Wilf.* 283. S. C. *et vide Rex v. Banks*, 3 *Burr.* 1452. 1 *Black.* 452. S. C. to present one duly elected mayor. *Rex v. Willis, Andr.* 279. and to the homage of a court baron to present conveyances of burgage

Sims's Cafe.

*Husband may
swear the peace
against his wife.
4 Cor. Dig.
Forceable Entry.
(D. 22.)*

HE exhibited articles of the peace against his wife, and the court received the same without any objection.

Ashley *vers.* Kell.

*Future effects of
a second bank-
rupt continue
his property till
seized.*

UPON motion for a new trial, the court held, that though under 5 Geo. 2. c. 30. the future effects of a bankrupt whom two commissions had issued, were liable to be seized for the benefit of creditors (1); yet the bankrupt had in the mean time such a property in them, as enabled him to transact and sell to a *bona fide* purchaser (2).

(1) *Ex parte Proudfoot*, 1 *Atk.* 253. *Evans v. Mann*, *Cowp.* 569. In *Martin v. O'Hara*, *ib.* 824. But they are not entitled to the profits of his personal labour. *Chippendale v. Tomlinson*, *Coke's Bank. Law*, 3d Ed. 518. (2) *Troughton v. Githy*, *Amb.* 630. *Chippendale v. Tomlinson*, *Coke's Bank. Laws* 518. *Colles v. Meryck*, 1 *Term Rep.* 361.

Dominus Rex *vers.* Roberts.

THE defendant having traversed an inquisition, whereby he was found to be a lunatick; the Attorney General filed the common replication: and it was sent from the petty-bag office to the King's Bench: the prosecutor of the commission made up the record, and carried it down to trial; and Mr. Roberts being ill, he did not appear, and no defence was made, and the jury found in favour of the inquest.

The traverser of an inquisition for the King is to be considered as a defendant.

Upon this a new trial was moved for upon two points. 1. That the supposed lunatick was in the nature of a plaintiff, and therefore had the right to carry down the record: and his traverse is in the nature of a *monstrans de droit*.

Upon such a traverse therefore in the case of lunacy the prosecutor of the commission has a right to make up the record and carry it down to trial. See the proceedings upon this case in chancery. 3 Atk. 5. 308.

To this it was answered, and resolved by the court, that he was properly to be considered as a defendant, opposing the title found for the crown, without setting up any title in himself, as he might do in a petition of right. And *Vaugh.* 62. and Lord Somers's argument in the *Banker's case*, and 4 *Hen.* 6. 13. a. were cited, and the form of the entries in *Tremain* 628, 652. *Coke's Ent.* 404, &c. shew it to be so. And indeed it would be absurd, to construe the liberty of traversing, to give a power of delaying the crown; which must be, if the party is considered as having the common right of a plaintiff. It was therefore held, that the record was well made up, and carried down by the prosecutor of the commission.

The second point was upon the illness of Roberts, who could not attend, and which was made out by affidavits. And the court thought it reasonable to grant a new trial for this upon the foot of accident, and because the Lord Chancellor and the former jury both had an inspection, which might be of great use to a second jury, who otherwise would be left to judge upon less evidence than the others had had.

A new trial was granted upon payment of costs. And at another day the court ordered it, upon the application of Mr. Roberts, to be tried at the bar by a jury of *Devon*, where the former inquisition was taken.

Belifante *vers.* Levy.

[1209]

THE affidavit to hold to special bail being defective, common bail was ordered; and thereupon the plaintiff on 19th April made a full affidavit, and took out a new writ, and held the defendant to bail; and the next day, 20th April, moved to discontinue upon payment of costs. *Et per curiam*, The plaintiff has been too quick, for he should have had the costs taxed and paid, before he took out a new writ. Therefore let

If a second writ is taken out pending the first, common bail shall be taken.

the defendant be discharged upon common bail, and let the plaintiff pay him his costs of this application (1).

(1) *Vide Belchier v. Gansell*, 4 Burr. 2502. *Olmus v. Delany*, post 1216.

Rios *vers.* Belifante.

Belief of debt is
no ground for
special bail.
Ante 1157.

THE affidavit to hold to special bail was made by a merchant in London, swearing that the defendant owed the plaintiff 270 l. as appears by an affidavit made by the plaintiff in Amsterdam, which the deponent believes to be true. *Et per curiam*, There can only be common bail; for the oath abroad is no ground for our process, and then there is nothing but the belief of a third person, which is not sufficient (1).

(1) *Claphamson v. Bowman*, post Burr. 655, and the authorities 1226. *Van Mersell v. Julian*, 1 there cited. *acc.* *Wils.* 231. *Pomp v. Ludvigson*, 2

Dominus Rex *vers.* Farewell.

Certiorari pro
Rege lies in case
of highways,
tho' no affidavit
or recognisance.

THE prosecutor of an indictment for a nuisance in the highway took out a *certiorari*; and the defendant moved to quash it, there being no affidavit made, according to the statute 5 W. & M. c. 11. nor any recognisance given according to that and former statutes of 13 & 14 Car. 2. c. 6. and 21 Car. 2. c. 12. and 3 W. & M. c. 12.

But the court on considering those acts held, that they related only to *certiorari*'s applied for by defendants, and not to one *pro Rege*, as this was. And many precedents were shewn of *certiorari*'s for a prosecutor taken out in the manner this was, and the *certiorari* was allowed (1).

(1) A report of this case purporting to be taken by Mr. *Masterman* at that time secondary of the crown office, which the editor has seen, after stating the argument of Mr. *Henley* for the defendant, reports the opinion of the court as follows, " *Lee* C. J. Enlarge the rule for a day or two and we will look into the several acts of parliament,

" but I own that I never
" know an instance where an
" affidavit in such a case as this
" was ever made by, or expected
" from a prosecutor, or any
" cognizance ever entered into
" If we should hold it necessary
" we should make fine work
" the crown office by overturning
" the proceedings in so many
" cases

"cases of this sort as there have
 "been.—In the case of *Bewdley*
 "(1 P. Wms. 249.) the court
 "gave an opinion in the very
 "teeth of an act of parliament,
 "because the course of the court
 "and the practice of the crown
 "office had been otherwise. Mr. J.
 "*Chapple*, the legislature by these
 "acts of parliament never intend-
 "ed to lay the prosecutor under
 "any hardships or difficulties."
 "That the *certiorari* to remove an
 "indictment against private persons
 "for not repairing an highway is
 "not taken away, *vide Rex v. Inba-*

bitants of Clace, 4 Bwr. 2456. in
 which case a distinction is taken
 where an indictment is actually
 prosecuted by the officer of the
 crown, and where it is carried on
 only in its name by a private pro-
 secutor, and it is there laid down
 that in the former case the crown
 has in every instance a right to de-
 mand a *certiorari*. In *Rex v. Bo-*
denham, Corup. 78. it was deter-
 mined that a *certiorari* lay to re-
 move an indictment upon 13 Geo.
 3. c. 78. for a nuisance to an
 highway *before traverse*, at the in-
 stance of a private prosecutor.

Sale *vers.* Crompton.

A Warrant of attorney was given in 1732, to confess a judg-
 ment for *Crompton*, but the record of the judgment had
 left out the *r*, and it was made *Compton*. And now the court
 refused to amend it by the warrant, for fear of inconveniencies
 to purchasers.

Old judgment
 not amendable.
 1 Wils. 61. S. C.
 more at large.

Trinity Term

* 17 & 18.
See Burr. S. C.
236. pl. 80.
1 Will. Rep. 75.
n. to 2d Ed.

* 17 Georgii 2 Regis. In B. R.

Sir William Lee, Knt. Chief Justice.

Sir William Chapple, Knt.

Martin Wright, Esq;

Thomas Denison, Esq;

}

Justices.

Sir Dudley Ryder, Knt. Attorney General.

The Hon. William Murray, Solicitor General.

Walmsley vers. Roson.

Practice in
error.
Ante 144.

AFTER judgment for the defendant the plaintiff brought error, and assigned infancy in the defendant, and appearance by attorney: then took out a *scire facias ad audiendum veritates*, and after a *scire feci* returned, entered the default. And upon producing the record the judgment was reversed on motion, without making it a *concilium*, or putting it in the paper.

Dominus Rex vers. Cornelius et al'.

No inspection
of books by a
prosecutor of a
misdemean-
our (1).
1 Will. 142.
S. C.

AN information was granted against them for a misdemeanour in taking money on granting of licences to alehouse-keepers at *Ipswich*.

(1) *Rex v. Worsenham*, 1 Lord Raym. 705. *Regina v. Mead*, 2 Lord Raym. 927. *Rex v. Doctor Purnell*, 1 Will. 239. 1 Black. Rep. 37. S. C. *Rex v. Lee*, cited *ib. Rex v. Haydon*, 1 Black. 351. S. P. *Vide also Rex v. Eternity of Hofsteden, &c.* pag 122 and the cases there cited.

The prosecutor applied for a rule to inspect the books of the corporation, alleging the defendants were only justices as they were bailiffs. But the Judges (*absente* C. J.) upon consideration refused to grant it, their right to be bailiffs or justices not being in question. And it is in effect obliging a defendant indicted for a misdemeanour, to furnish evidence against himself.

Goodtitle *vers.* Meymott.

IN the declaration delivered to the tenant in possession, *the* said James instead of John, was said to enter by virtue of the demise; and the court refused to amend it, for they considered it as a process. And Mr. Justice Wright cited a (a) case, *Hil.* 15 Geo. 2, where the premises were laid to lie in Twickenham and Isleworth or one of them, and the court refused to let the plaintiff amend by striking out the disjunctive words (1)

Declaration in ejectment not amendable.

(a) The name of it was *Truetile v. Ashburn & al.*

(1) *Roe v. Doe on dem. of Ste-* *v. Shepherd, post 1272, in Parsons*
erson, 2 Barnes 186. Vide Oates v. Gill, Lord Raym. 896.

Dominus Rex *vers.* Bailey.

THE court refused to quash an indictment for not attending the mayor of Sarum, to execute his warrant and said the defendant might demur to it (1).

What indictment not quashable.

(1) *Vide* the several cases in which the court have either quashed an indictment or left the defendant to demur to it, collected 2 *Hawk. P. C. c. 25. s. 146*, and note [H] 7 Ed. 4 vol. 83.

Swaine *vers.* De Mattos. At Guildhall.

ON a question about a bankruptcy, the Chief Justice held, that though the preamble of 7 Geo. 1. c. 31. speaks only of bonds given for goods in trade payable at a future day, yet the acting words extend to all sorts of bonds for the payment of money; and that the words *such security* do not mean security for such a sort of debt, but security by bonds, bills, notes, &c. (1).

Construction of 7 G. 1. as to bonds payable at a future day

(1) *Per Wilmot C. J. in Chilton v. Whiffin, 3 Willf. 17. and Goddard v. Vanderbeyden, 3 Willf. 262. Wilmot v. Banks, Cowp. 546. S. P.*

So a bond for payment of an annuity for a term of years is within this statute, *ib.* So also a bond to pay a debt by instalments, *Brooks v.*

R r

Lloyd,

Lloyd, 1 Term Rep. 17. It extends also to goods sold on credit. *Cockran v. Love. at N. P. cor Ld. Kenyon, C. J. 3d June 1790. Cook's Bank. Laws 23. 3d Ed.* But a contract at an *East India* sale by *A.* for a

parcel of goods to be paid for at a future day before which *A.* becomes a bankrupt, the goods not being delivered, is not *Ex parte* the *East India Company. 2 P. Wms.* 395.

Banbury *vers.* Liffet et al'. At Guildhall.

What is not a bill of exchange, or absolute acceptance.

THE plaintiff declared upon the custom of merchants against the defendants as acceptors of a bill of exchange: and the instrument run in these words:

[1212]

Messieurs Gilly and Co.

4 Feb. 1741

Pray pay Mr. Richard Banbury one month after date two hundred pounds on account of freight of the *Veale galley*. Edward Champion, and this order shall be your sufficient discharge for the same.

J. Gibson.

Accepted for Liffet and Gilly of Leghorne to pay as remitted from thence at usance.

18 March 1741.

H. Gilly

And two objections were made by the defendants: 1. That this was not a bill of exchange, for it is not payable to order, or as to be negotiable (1) it is not said to be for value received. And it is only an order upon a particular fund, like the case of *Jenny v. Herle, (ante 591.)* and several merchants proved, that they did not look upon it to be a bill of exchange; and others were of a contrary opinion.

The Chief Justice ruled it not to be a bill of exchange. He said it was not in the power of the parties to make what for they please pass for such a bill, it ought to be agreeable to the *lex mercatoria*: the privilege arises from the convenience to trade which is not consulted in this case. And he thought it bad upon the objection to the fund out of which it was to be paid (2) however, being a mercantile transaction, he left it to the speculation of merchants: who found it to be no bill of exchange, and the objection for want of value received (2).

(1) This objection was taken in *Chamberlyn v. Delarive, 2 Wils. 353.* where the court gave no opinion upon the point. But in *Smith v. Kendal, Mich. 35 Geo. 3.* they decided a bill to be negotiable without these words. See the declarations also in *Mannin v. Cary, 1 Lutw. 277. Horton v. Coggs, 3 Lev. 296.* And that they are not necessary in promissory notes, *vide Moore v. Paine, Cases in*

B. R. temp. Hard. 288.

(2) *Vide, That this is necessary Mackled v. Sme, 2 Ld. Raym. 1481. Evelyn v. M. 1 Barn. B. R. 88. Joslin v. L. scerre, Fort. 282. Death v. S. wouters, 1 Lutw. 889. J. Heale, 8 Mod. 267. Cranling v. Evans, 1 Sbro. 5. 1 Mod. Est. 4. and White v. Ledwiche, Bailiffs, Appendix No. 3, where point is considered as settled.*

The second objection was, that the plaintiff (supposing it a bill of exchange) had not shewn there was any remittance to the defendants. And that this was not an absolute acceptance but only conditional. And so the Chief Justice declared he understood it, and left it to the jury (3): But they finding for the defendants upon the first point, gave no opinion as to this.

(3) *Smith v. Abbot*, ante 1152.
Julian v. Sbrooke, 2 *Wils.* 9. S. P. But it is now held, that it is the sole province of the court to decide what is an absolute and

what a conditional acceptance, and that it is not a question for a jury.
Sproat v. Matthews, 1 *Term Rep.* 182. *Per Buller and Ashurst J.*
Willes J. contra.

Michaelmas Term

18 Georgii 2 Regis. In B. R.

Sir William Lee, Knt. Chief Justice.

Sir William Chapple, Knt.

Martin Wright, Esq;

Thomas Denison, Esq;

} *Justices.*

Sir Dudley Ryder, Knt. Attorney General.

The Hon. William Murray, Solicitor General.

Dominus Rex v. Goudge.

Quo warranto
lies for the of-
fice of constable.

Ante 1149.

THE court granted an information in the nature of a *quo warranto* against him, to shew by what authority he exercised the office of a constable for *Whitechapple* parish, under a pretence of an election at the vestry, and a swearing in at the sessions. For *per curiam*, *Prima facie* the right of appointing is in the leet, and the sessions have no power by 13 & 14 Car. 2. c. 12. except there is a default at the leet (1). And this office of constable is of such a nature, that informations have been granted to try the right. Particularly *Hil. 14 Geo. 2. Dominus Rex v. Franchard*, where the court made no difficulty on that head though they discharged the rule upon the merits.

(1) *Constable of Limington's case*, ante 798. *Vide Rex v. Sir Thomas Reynell*, ante 1161. And the note.

Dominus Rex *vers.* Roberts.

ON a trial at bar of a traverse to an inquisition of lunacy, one of the jury was called by the name of *Henry*, and informed the court he was christened by the name of *Harry*, but owned he was the person summoned; it was proposed to alter it by consent; but the defendant's counsel refusing, the court ordered it to be amended *ex officio*, by virtue of the statutes of Hen. 6. c. 12. and c. 15. And so the trial went on.

Amendment.
Ante 1208.
1 Com. Dig.
Tit. Amend-
ment. (F. 454.)

Bolton *vers.* Prentice.¹

IN *assumpsit* for goods sold and delivered to the defendant's wife, the case appeared to be, that the defendant and his wife had formerly lodged at the plaintiff's house, and the plaintiff furnished her with goods; and the defendant finding the plaintiff had helped her to pawn her watch, and suspecting he confederated with her, left the lodgings, after paying the plaintiff his bill, and forbidding him ever trusting her again.

A husband who turns away his wife without cause and refuseth to provide for her, cannot make a particular prohibition.
Vide Salk. 113.
Ld. Raym. 1006.

After this the defendant and his wife cohabited together for a year, when without any cause appearing he left her, locked up her cloaths, and upon her finding him out, refused to admit her, and struck her, and declared he would not maintain her, or pay anybody that did. In this distress she borrowed cloaths of her friends, and applied to the plaintiff, who furnished her with necessaries according to the defendant's degree; which the defendant refusing to pay for, this action was brought; and upon trial the jury found for the plaintiff.

Upon motion for a new trial, the court held the verdict was right; for whilst they were at the plaintiff's, there was a particular reason for the particular prohibition; yet the causeless turning her away destitute afterwards, gave her the general credit again: and if a husband should be allowed, under the notion of a particular prohibition, to destroy her obtaining credit in the place, he may in the same manner prevent it with all people she is acquainted with. He appears to be a wrong-doer, and therefore has no right to prohibit any body. They distinguished this case from the case of *Manby v. Scott*, 1 Sid. 109, for there the wife was guilty of the first wrong in eloping (1).

(1) A feme covert is in general unable to enter into any contract, *Vide* Gilb. *Law of Evidence*, 2d Ed. 183. *Bull. L. N. P.* 134.

But where the husband and wife cohabit, if the latter take up goods it is *prima facie* evidence of a contract entered into by the husband.

husband through the means of his wife as his agent. *ib. Langfort v. Tyler, Salk. 113.* But the law has considered this presumption as stronger and less easy to be repelled where the contract is for such necessities for the wife and family as are suited to the rank and circumstances of the husband. In the present note it is proposed to consider merely how far such contracts of the wife bind the husband. In doing which it will be necessary to see, **FIRST**, what the law is WHILE THE BARON AND FEME LIVE TOGETHER. **SECONDLY**, WHAT IT IS WHEN THEY LIVE SEPARATE. In the first case, the husband is liable to the wife's contract for necessities, *Dier v. East, 1 Vent. 43. 1 Mod. 9. 1 Sid. 425. S. C. Beaumont v. Weldon, 2 Vent. 155.* and that though she conduct herself unchastely, *Robison v. Gosnold, 1 Salk. 119. 6 Mod. 171. S. C.* or contract for them with an improper design of converting them to some other use, or of injuring the husband. But of this the tradesman must be ignorant, *Morton v. Withens, Skinn. 348. Sed vide Etherington v. Parrot, infra.* But if the tradesman selling receives specific notice either by himself or his servant not to credit her, the husband will not in this case be liable, *Etherington v. Parrot, 1 Ld. Raym. 1006. Longworth v. Hockmore, 12 Mod. 244. 1 Ld. Raym. 444. S. C.* Thus far the engagement of the wife affects the husband upon the presumption that during their union he has authorised her generally to contract as his representative for such things as being within her domestic province may be supposed to be entrusted to her management. But we have seen from the cases just cited, that this presumption may be rebutted by express notice that she is not. But, in the se-

COND CASE put; that is, WHERE THEY ARE SEPARATED. Separation destroys the presumption of agency, and where any notice can discharge the husband, the notice of that circumstance will be as good as a specific desire not to credit her. Here however it is to be observed that the law accommodating itself to human exigencies does in some situations refuse to raise any presumption in favour of the contract so as to affect the husband at all; while in others it raises one so violent, that no notice, however strongly brought home to the person trusting the wife can exonerate him from the burthen of her agreement. This depends upon the manner in which the separation between the parties has taken place; and there seem to be five different ways in which it may occur so as to have an effect in some degree different upon the husband's liability to be bound by the contracts of his wife. The first case is, *Where they are parted by consent, and the wife is allowed a separate maintenance.* In this case the husband is not liable, *Todd v. Stokes, 1 Ld. Raym. 444. 1 Salk. 116. S. C. Ferrars v. Ferrars, 1 Vern. 71. Augies v. Augies, Prec. in Chanc. 499. Rep. verbatim the same Gilk. Eq. Rep. 153. Dent v. Scot, Alleg. 61. Cragg v. Bowman, 6 Mod. 147.* In *Corbet v. Polnitz, 1 Term Rep. 9.* and where the husband was of a low degree, the earnings of the wife have been held equivalent to such a maintenance, *Warr v. Huntley, Salk. 118.* Most of these cases seem to state that a public notice of the separation, although not a specific one to the individual who gives her credit is necessary to discharge the husband. But *Cragg v. Bowman, ut supra* is contra. Where this separation has thus taken place, and there has been

an allowance of a sufficient maintenance to the wife, recent determinations have not merely held the husband discharged from the obligation of contracts entered into by her, but have regarded her as being *sui juris* with regard to matters of property, in the same manner as she is by the civil law. They have considered her therefore as being so far emancipated by the agreement from the incapacities incident to coverture, as to be capable of contracting not only for necessities, but for every other thing which can be made the subject matter of agreement, and consequently as being liable to be sued in courts of common law as if she were a feme sole. This exception to the general rule of law, although new in its application to this situation which the customs of present times have given birth to, yet seems warranted by the principle of the old law, which likewise conformed to the existing manners of the age, and restored a feme covert to her capacity to contract and sue where the situation of the *barron* made it impossible for him either to manage the concerns, or interfere for the protection of his wife and family; as when he has been in exile, or abjured the realm, *Co. Lit.* 132. b. 4 *Vin. Abr.* 152. Courts of equity also have indulged her in the separate enjoyment of property even while living with her husband, and have invested her with necessary powers to defend it against him, *Kirk v. Clark, Prac. in Chanc.* 275. *Griffith v. Hood*, 2 *Vez.* 452. Nay, have allowed her such an independent existence as to permit her to be sued by him in matters relating to it, *Brooks v. Brooks, Prac. in Chanc.* 24. *Moore v. Moore*, 1 *Atk.* 272. The propriety of the decisions of courts of law upon this subject however have

been questioned by great authority, *vide Hatchet v. Baddeley*, 2 *Black. Rep.* 1079. and the opinion of Lord Kenyon C. J. in *Ellab v. Leigh*, 5 *Term Rep.* 682. I am aware of no case in which a woman in this situation has brought an action to enforce a contract entered into with her. But the principle by which others are enabled to sue her must go the length of reciprocally enabling her to sue them, and the former has been sustained in the following cases, *Ringstead v. Lady Laneshorough*, *Hil.* 23 *Geo.* 3. *B. R.* *Barwell v. Brooks*, *Hil.* 23 *Geo.* 3. *B. R.* *Sparrow v. Caruthers*, *Carlisle assizes* 1768. cor. *Yates J.* cited 1 *Term Rep.* 67. *Corbett v. Poelnitz*, *Ib.* 5. *Compton v. Collinson*, 1 *H. Black.* 364. 2 *Bro. Chanc. Cas.* 377. *S. C.* *Lean v. Sebutz*, 2 *Black.* 1195. *Vide also E. Wilmer's case*, *Moore* 851. *Deerly v. Dutcheffs of Mazarine*, *Salk.* 116. 1 *Ld. Raym.* 14. *Comb.* 402. *S. C.* *Peacock v. Monk*, 1 *Ves.* 193. But to make her liable to be sued thus, she must not only live separate from her husband, but must have a maintenance independent of him, *Gilchrist v. Brown*, 4 *Term Rep.* 766. and it must be permanently secured to her, *Ellab v. Leigh*, 5 *Term Rep.* 679. *Sedman v. Gooch*, *Espinasse's Ca. at N. Pri.* 2. But we have already seen, that this permanent subsistence is not necessary merely to discharge the husband. The second case is, *When the wife has eloped with an adulterer*, and then also the husband is not liable, *Car v. King*, 12 *Mod.* 372. *Morris v. Martin*, ante 647. *Manwaring v. Sands*, ante 705. The third is, *Where she has departed from him without his consent, but not with an adulterer*; in which case also she cannot bind the husband for necessities, *Etherington v. Parrot*, ut supra. *Lungworth*

Langworth v. Hackmore, *ut supra*. *Child v. Hardyman*, *ante* 875. *James v. Warren*, *Holt* 104. But there is this distinction between the two cases, that in the latter if the wife offers to return and the husband refuses to receive her *at all*, his liability to be affected by her contract for necessaries, is perhaps revived from that time. *Manby v. Scot*, 1 *Bac. Abr. Baron and Feme* (H) 1 *Sid.* 109. 1 *Lev.* 4. 1 *Keb.* 69. 10. 87. 206. 337. 361. 383. 429. 441. 482. 1 *Mod.* 124. *S. C.* is *contra*. But *Twyssden J.* and two other judges were dissentient. See *James v. Warren*, *ut supra*. *Child v. Hardyman*, *ante* 875. And in this case a general notice not to give credit to the wife seems necessary to exonerate the husband, *vide Langworthy v. Hackmore*, 1 *Ld. Raym.* 444. *Hinton v. Hudson*, *Freem. Rep.* 248. and the cases cited *supra*. But in the former case the husband must actually receive her again before she can contract so as to affect him, *Robison v. Gofnold*, *ut supra*. And the husband is discharged, whether the tradesman has notice of the separation or not, *Morris v. Martin*, *ante* 647. *Mainwaring v. Sands*, *ante* 706. The fourth case is, *Where the husband leaves his wife, though it be for her lewd conduct, or forces her to leave him by cruelty*. In this event he carries a general credit for necessaries along with her, and if a particular prohibition from trusting her has been given, it is thereby revoked. See in addition to the present case, *Etherington v.*

Parrot, *Salk.* 118. *Thompson v. Harvey*, 4 *Burr.* 2177. I have not met with any case deciding the liability of the husband, where he and the wife having parted by consent upon a parol agreement to allow her a sufficient maintenance, that allowance is afterwards withheld by him. But I suppose that he would be deemed liable from the time of his withdrawing it upon the same principle that he is held so in the two last cases. The fifth case is, *Where the husband and wife are separated in consequence of the sentence of the law*. When this is a *mens et thoro* by sentence in the ecclesiastical court, the law allows her alimony at the discretion of the judge, unless she has eloped and lives with an adulterer, 1 *Black. Com.* 429. And as the common law gives her a writ to recover this, it would seem that the husband is excused from the obligation of her contracts, *vide Ellab v. Leigh*, 5 *Term Rep.* 679. Where she is sentenced to a temporary confinement as a punishment for some crime, the husband has been held not liable to her agreements, even for necessities, if she is kept in an improper place by the covin of the gaoler, *Fowles v. Dinely*, *ante* 1122. But in *Scot v. Manley* the judges who argue for the plaintiff lay it down as clear law, that if a wife be prisoner for felony, and the gaoler provides her with food, that the husband may be charged for it, 1 *Sid.* 118.

Dominus Rex *vers.* Morgan.

Pardon pleaded
in *forma pauperis*.

HE was convicted of perjury, and outlawed for forgery, but obtained his Majesty's pardon. And upon motion grounded on the common affidavit of poverty, and no cause shewn by the prosecutor, he was admitted to plead it *in forma pauperis*.

Unwin *vers.* Kirchoffe.

UPON motion to supersede the defendant, as not being charged in execution in two terms; the court held, that the *committitur* must be actually entred on record before the end of the second term. And that there is no extension of the time to the continuance day after term, nor was it sufficient that there was an entry in the marshal's book in time (1).

(1) *Fotterel v. Philby*, 3 Burr. 1841. S. P.

Landon *vers.* Pickering.

ERROR of a judgment in *Communi Banco* of Michaelmas term, 10 Geo. 2. in debt upon a *mutuatus*. And after assigning the want of an original, and verifying the same, the defendant in error pleaded a release of errors dated 13 November, 10 Geo. 2. with an averment that there was no other judgment between the parties. And the plaintiff in error craving *oyer* thereof, it appeared, that the warrant of attorney and release of errors were both in one instrument dated 13 November: and therefore on demurrer it was insisted, that it could not be applied to the judgment in question, which upon the *oyer* appeared to take its rise only on the 13th of November, whereas the judgment on record was generally of Michaelmas term, and referred to the first day of the term: and there was nothing for the release to operate upon when it was given. And *Cro. El.* 837. 5 Co. 70. b. 28. b. *Allen* 71. *Salk.* 197. were cited.

A warrant of attorney and a release of errors of a day in term are good. 5 Com. Dig. Pleader. (3 B. 19.)

Sed per curiam, The two instruments are very consistent, if we take in the legal relation, as we ought to do, in order to give every part of the deed its proper operation; and then it will stand as a judgment 23 October, and a release after. It would overturn many judgments by confession, if what the plaintiff in error contends for should prevail. The judgment therefore must be, that the plaintiff in error take nothing by his writ.

Southouse *vers.* Boak.

THE court refused to change the *venue* into Durham, the Judges not going thither in the *Lent* circuit. Whereupon the defendant offered to try it in *Yorkshire*, but the plaintiff refusing to consent, the court said they could do nothing in it.

Venue not to be changed into a third county without consent (1).

Osgood *vers.* Lyon.

On notice of trial the distance from London is taken by the computed miles.

ODIAM in *Hants* is reputed from 35 to 38 miles distance from *London*, but now upon setting up mile stones, it appears to be above 40. And on the question, whether eight days notice of trial was good: the court held it to be so, they going by the computed miles, as was determined in the case of one who lived at *Ailesbury*, *ante* 954.

Olmus *vers.* Delany.

Where a man may be held to bail in a second action pending the first.

IN debt upon a bond for 900 *l.* the defendant put in bail who justified in court, and were allowed. The plaintiff finding they were forsworn, and worth nothing, discontinued but before he had done so, he arrested the defendant in a second action, and held him to bail. The defendant moved to be discharged on common bail, according to the case of *Bell fante v. Levy*, *ante* 1209, (1) and obtained a rule to shew cause: when the whole villany appearing, the court discharged the rule, and said the plaintiff was right in laying hold of him as he did; for had he discontinued before, the defendant would probably have run away: and therefore ordered he should be held to special bail. *Strange pro def.*

(1) *Vide Turton v. Hayes*, *ante* Barnes 612. but see *Belchier* 439, and *Whalley v. Martin*, *Ganfell*, 4 *Burr.* 2502.

Dominus Rex *vers.* William Clarke, Esq;

Information against a justice for bailing a felon.

HE as a justice of *Surrey* committed a man on suspicion of stealing a mare, and bound over the owner to prosecute. Afterwards upon examining two other persons, he admitted the party to bail. The prosecutor appeared at the assizes, and found a bill, but the party accused did not appear. And the court granted an information against the justice, declaring they should not have bailed the man themselves.

[1217]

Webb qui tam *vers.* Punter.

Practice.

IN debt for the penalty of 5 *l.* in killing a hare (with another count) the court let the defendant bring in the penalty and costs (1).

(1) *Stock v. Eagle*, 2 *Black.* 1052.

Case of the Bail of Peter Vergen.

HE was convicted for felony, and pardoned on condition of transportation. And having also a civil action depending against him, in which he had given bail, they brought him up by *habeas corpus* in order to surrender him. It was objected, that the court could not take him out of the custody of the sheriff, and commit him to the marshal; to which I answered, that upon the return of the writ he was to be considered as the prisoner of the court, who might do what they would with him, and send him back to *Newgate* for safer custody. So the bail were admitted to deliver him to the marshal, and the court immediately remanded him to *Newgate* (1).

The bail of a convict allowed to surrender in discharge of themselves.

(1) *Vide Fowler v. Dunn*, 4 though the motion for an *Hab. Corp.* there was denied.
Err. 2034. where the authority
this case seems admitted,

Gardiner *vers.* Holt.

AN infant sued by *prochein amy*, and there was a verdict against him and judgment for costs. And now being taken in execution, he moved to be discharged, and cited *Cro. Jac.* 33. *Cro. Jac.* 640. *Sed per curiam*, If costs cannot be given, it will be matter of error to be insisted on; but we will not discharge him on motion. Where he is a defendant he certainly pays costs. *Dyer* 104. 1 *Bulst.* 189.

Where infant was plaintiff and in execution for costs, the court would not discharge him on motion.

Cooke *vers.* Colehan.

ON error from *C. B.* a note to pay to *A.* or order, six weeks after the death of the defendant's father, for value received, was held to be a negotiable note within the statute 3 *Ann. c. 9.* for there is no contingency, whereby it may never become payable, but it is only uncertain as to the time, which is the case of all bills payable at so many days after sight. In *Com. v. Banco* it held three arguments, and was held good upon a solemn resolution delivered by Chief Justice *Willes* (1).

What a negotiable note.
1 *Wils.* 263.
Ante 24. 706.
1151.

(1) *Bull. L. N. P.* 273. *Evans v. Underwood*, 1 *Wils.* 262.

Crawford *vers.* Satchwell.

If the defendant omits to plead a misnomer, he may be taken in execution by the wrong name.

THE plaintiff brought trespass and false imprisonment by the christian name of *Archibald*. The defendant justified under a *capias ad satisfaciendum* upon a judgment against *Arthur* and averred that the plaintiff in this action was the same person who was sued by the name of *Arthur*. And on demurrer the court held it a good plea, the defendant having missed his time for taking advantage of the *misnomer*, which should have been by pleading it in the first action. (In the case of a bond given in a wrong name, he must be sued by that wrong name, and the execution must pursue it.) The defendant had judgment.

Taylor *vers.* Wasteneys.

Common bail ordered though on a note given after a former action superseded.

THE defendant being arrested for 25 *l.* lay in gaol till he was superseded. The plaintiff meeting him afterwards got a note of him for 20 *l.* and brought a fresh action upon it and held him to bail. But the court discharged him upon common bail, for it is but a farther security, and does not extinguish the former cause of action, which may be declared upon still (1).

(1) *Vide Turner v. Schomberg*, ante 782. *Hall v. Hewes*, ante post. 1233. *Chambers v. Robinson*, 1039.

Hilary Term

18 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir William Chapple, *Knt.*

Martin Wright, *Esq;*

Thomas Denison, *Esq;*

} *Justices.*

Sir Dudley Ryder, *Knt. Attorney General.*

The Hon. William Murray, Solicitor General.

Dominus Rex vers. Turner et al.

A Rule to shew cause why an appointment of overseers for *Quakers*, Cirencester should not be quashed, was served by a quaker, and on his affirmation made absolute; this not being looked on as a criminal prosecution, though it is on the crown side, and the rule intitled in the King's name (1).

1) *Robins v. Sayward*, ante 441. *Rex v. Wych*, ante 872.

Walrond vers. Franksam.

A N executrix in order to hold the defendant to bail made an affidavit, that he was indebted to her testator (so much) appears by the books of her testator. And it was held insufficient, and common bail ordered (1).

Swearing to a debt as appears by books will not hold to bail. Ante 1157. 1209.

(1) *Vide Pomp v. Ludvigson*, and more cases to S. P. cited 4 Burr. 655. and a long list of *Burr. 1094.* and *Heathcote v. Goslin*, ante 1157. But in the case *Richardson*, 1b. 1032. S. P. of assignees, executors, &c. if the party

S s

party swears that *he believes the account to be true*, it is sufficient to hold the defendant to special bail. *Tonna v. Edwards*, 4 Burr. 2289; *Sheldon v. Baker*, 1 Term Rep. 83; *Swayne v. Grammond*, 4 Term Rep. 176; *Barclay v. Hunt*, 4 Burr. 1993.

[1220]

Dominus Rex *vers.* White et al'.

No *scire facias* on recognizance can be tested the day the party makes default.

THE condition of their recognizance was, to appear in the King's Bench the last day of *Michaelmas* term: on which day articles of the peace were exhibited, and the defendant *White* forbore to move to have his appearance recorded, (though he was there) and went to get bail. The prosecutor on the next day took out a *scire facias* tested 28 November. And partly for the sharpness of the proceeding, and because the *scire facias* must be tested in term time, and he had to the last moment of it to appear in, the court set aside the proceedings.

Hand *vers.* Lady Dinely.

If the costs are not paid on bringing money into court, the plaintiff must go on and cannot have an attachment (1).

IN *assumpsit* the defendant brought 8*l.* into court on the usual terms of paying costs to that time; the plaintiff took out, and taxed his costs, and served the defendant's attorney, and they not being paid, went on to trial, and obtained a verdict for 7*l.* 18*s.* The defendant insisted that he should have his costs for his subsequent proceedings, since it appeared that he was over-paid: but the court held, that as to the costs, it was to be considered as if no motion had been made, the defendant having fulfilled the terms of her own rule, in which case it is not usual to grant an attachment; but the plaintiff goes on, being only a conditional rule. They said they would make an allowance upon the execution for the 8*l.* he had taken out of court, and ordered him the *posse* in order to tax his whole costs.

(1) *Vide Scarrall v. Horton*, Prac. Reg. 259. Barnes 283.

Wilkins *vers.* Brown.

Where the replication ought to conclude to the country. 1 Com. Dig. tit. Abatement. (E. 13.) 4 Com. Dig. Pleading. (2 D. 3.)

COVENANT by the plaintiff as executrix of *Bullock*: the defendant pleads, that there was another executor, who proved the will, administered, and is living; wherefore as he is not joined, he prays the bill may be abated. The plaintiff replies, that the other executor named in the will is an infant, seven years, and never administered, and concludes with an averment: to which the defendant demurred generally: and by argument by Serjeant *Belfield* and myself, the court held

ill replication; the plea (they said) contained full matter of abatement, if it was true; and the plaintiff should therefore have joined issue upon it, and not gone over to a matter of infancy, which would have been properly under consideration upon the issue: a probate granted to one under seventeen is not therefore void. And if the infant really was not joined in the probate, the plaintiff should have set it out on *oyer*, and have traversed the never administering as executor. *Vide* 1 Lev. 299. 1 Brownl. 101. and *Smith v. Smith* in *Yel.* and Sir T. Jones's Reports. The judgment was to abate the bill.

[1221]

1 Sid. 242.
1 Lev. 161.

Lekeux *vers.* Nash. At Guildhall.

IN debt for rent against the defendant as assignee of a term, he pleaded that he had made a further assignment to one Reed before the time for which the rent was demanded. To which the plaintiff replied, *non assignavit*. And on the trial it appeared, that the defendant being weary of the assignment he had taken, employed a person to find him one who would take it off his hands; and Reed a poor woman, then a prisoner in the Fleet, was prevailed on to accept it; and Nash in consideration of 5s. (which it appeared he lent her for that purpose) made a formal assignment. The defendant insisting that this was not proper evidence on *non assignavit*, but that the plaintiff should have replied *per fraudem*; the Chief Justice held, it could not be gone into on this issue, according to the case in *Hob.* 72, 166 (1). The plaintiff became nonsuit.

Fraud cannot be gone into on a general replication of *non assignavit*, and an assignment by a former assignee to a beggar is not fraudulent.

And now a new action being brought, and fraud replied; it was debated, whether this was to be considered as fraudulent or not: and the Chief Justice directed the jury to find for the defendant. He said the defendant could not be charged upon the privy of estate, which was destroyed as against him by the legal assignment to Reed; and it was the folly of the plaintiff to discharge the original lessee: that Reed's being a beggar did not alter the case, as was said in *Pitcher v. Tovey*, *Salk.* 81. 4 Mod.

Bull. L. N. F.
159.

(a) He grounded his opinion chiefly on two modern cases in Chancery, where this had been determined to be no fraud. The first was *Valliant v. Dodimead* (b), 2 May 16 Geo. 2. and *Huddle v. Hawkby* (c), 4 February 1744. upon the foot that an as-

(a) 2 Vent. 234.
3 Lev. 295.
1 Show. 340.
Carth. 177.
12 Mod. 23.
Holt 73. S. C.
(b) 2 Atk. 546.
(c) It appears by

the minutes taken of the decree in this cause, that the plaintiff's bill was to have an account of the rents and satisfaction for damages; and to have the assignment of the lease delivered up or set aside, which the court dismissed, but without costs, and the plaintiff ordered to deliver the bond for performance of covenants in the lease to the defendant, given to him by a third person, which was accordingly done in court. Note to 2d. Edition.

(1) *Vide* *Aren.* 1 Vent. 329—331. *Walker v. Reeves*, *Doug.* 1. n. [1.]

signee ought not to be chargeable any longer than he occupies the premises.

This being merely a point of law, the Chief Justice told the jury, they must find for the defendant: which they were very unwilling to do, and therefore to prevent their going contrary to his opinion, I suffered a nonsuit.

[1222]

Dominus Rex *vers.* Coningsby et al'.

The sessions of particular liberties have the determination of appeals about the poor, and not the county sessions.

THE accounts of the overseers of *Watford* in *Hertfordshire* having been allowed by two justices of the peace, an appeal was lodged at the county sessions, which the justices of the peace there refused to proceed upon, being of opinion, that as *Watford* was within the liberty of *St. Alban's*, the appeal ought to have been to the liberty sessions. Upon this a *mandamus* was moved for, requiring the county justices of the peace to proceed. And it was insisted on, that by the 43 *Eliz. c. 2.* all appeals must be to the county sessions: and if the liberty could have jurisdiction, it would at most be only a concurrent one, and the appeal might be to either at the election of the party. But upon shewing cause the rule was discharged, upon an affidavit that in fact the justices of the peace of the liberty do as such constantly appoint the overseers, and determine about them at their sessions, without one instance to the contrary; which the court said, was to be considered as explanatory of the general words in the 43 *Eliz.* and is now confirmed by the 17 *Geo. 2. c. 38.* which mentions divisions and franchises who have four justices, and here are many more.

Cressly *vers.* Webb et al'.

Damages assessed against J. faulters though the defendants pleading to issue are acquitted. Ante 507, 1108. (1)

WEBB only pleaded to issue, the other defendants let judgment go by default. And it came on at *Guildhall* to try the issue, and also to assess the damages as to the others. On the trial *Webb* was acquitted: and a doubt arose, whether the plaintiff could go on: but the Chief Justice thought he might proceed, and he did so.

(1) *Bull. L. N. P.* 20.

[1223]

Dominus Rex *vers.* the Fraternity of Hostmen in *Newcastle upon-Tyne*.

Where books of a corporation may be inspected on disputes to which they are no parties.

A *Mandamus* was granted, to admit a person into this company: and by the return it appeared to be a question whether the master he served had been admitted to his freedom in the corporation at large: whereupon he moved for a general rule to inspect the books of the corporation. I opposed this

behalf of the corporation, as they were no parties to the dispute : and cited the cases of *Cobb v. Oldfield*, (Hil. 4 Geo. 1.) and *Shelling v. Farmer*, (ante 646.) *Crew v. Saunders*, (ante 1005.) and the case of *Dr. Bridgeman*, (ante 1203). But the court said, that every member of the corporation had, as such, a right to look into the books for any matter that concerned himself, though it was in a dispute with others. And the return having pointed out the necessity of inspecting them for a particular purpose, they would assist him with a rule; but it should be confined to the book wherein admissions of freemen are entered (1).

(1) The liberty given to inspect and take copies of books and other instruments, which are of right in the care of other persons, is grounded either upon a motion for a *mandamus* to that effect, or upon one made in an existing suit, and founded on the supposition that the matters therein contained are necessary to the attainment of justice between the parties to the action. Instances of motions of this last kind are much more frequently to be met with in our reports than of the former. It is the intention of the present note therefore to treat principally of them, pointing out incidentally how and where the application by *mandamus* seems to differ from them, either in the grounds upon which, or the extent to which it is to be obtained. In the case of existing actions these motions seem to have been first introduced with respect to court rolls, *vide Crew qui tam v. Saunders*, ante 1005. and the principle which induced the court to grant them there, seems to regulate their discretion in most instances to which they have hitherto extended the rule: namely, such instruments as are the common evidence of several persons placed in the hands of one custodian for the benefit of all those who have this interest in them as being the evidence of their rights. This principle appears to apply also to motions for a *mandamus*,

except that perhaps a degree of ownership must appear more strong and positive to the court there, in order to entitle the party to the effect of his application. The various cases to be found in the books in which the court have granted these rules depend in a great measure upon their peculiar circumstances, but they may, with perhaps a few exceptions, where the cases seem contradictory, be reduced under these four heads. FIRST, Such documents of public proceedings as are lodged in the custody of public officers for the public use. These (at least in general) every subject has a right to inspect without shewing in his affidavit whether they relate directly to the point in question or not. *Herbert v. Ashburner*, 1 *Wils.* 297. *Rex v. Barking*, cited 1 *Wils.* 240. 1 *Black. Rep.* 39. *S. C. Rex v. King*, 2 *Term Rep.* 234. and see *Moody v. Thurston*, ante 304. But in some instances the court will not grant a copy of such instruments where it is contrary to public policy. Thus a copy of an indictment will be refused to the person indicted and acquitted, if there appear to have been a probable cause for the accusation, *Groenwoelt v. Burrell*, 1 *Lord Raym.* 253. *Carth.* 421. *S. C. Jordan v. Lewis*, ante 1122. SECONDLY, Such books, &c. as are the common property of aggregate bodies acknowledged as such by our law, in which every

every member has an interest as being the evidence of some property or franchise having vested in him, or of his having conducted himself in the exercise of that franchise correctly. Such are corporation books with respect to corporators. *Slade v. Walter*, 12 *Vin. Abr.* 146. pl. 8. *Rex v. Littleton & al*, *Ib.* 147. pl. 13. *Geary v. Hopkins*, 2 *Ld. Raym.* 851. 7 *Mod.* 127. S. C. *Richards qui tam v. Pattinson*, *Barnes* 235. *Com. Rep.* 555. S. C. *Rex v. Hollister*, *Cas. Temp. Hard.* 245. *Warriner v. Giles*, ante 954. *Dr. Young v. Dr. Lynch*, 1 *Black. Rep.* 27. *Dr. Bentley v. Bishop of Ely*, 1 *Barnard. B. R.* 193. The rolls of copyhold courts and of courts baron, with regard to their respective suitors. *Roe v. Aylmar*, *Barnes* 236. *Hobson v. Parker*, *Baldwyn v. Tudge*, *Ib.* 237. *Addington v. Clode*, 2 *Black.* 1030. *Folkard v. Hemet*, *Ib.* 1061. *Rex v. Shellely*, 3 *Term Rep.* 141. So also parish books, *Cox v. Copping*, 5 *Mod.* 395, &c. But the court will only grant the rule under the following circumstances: 1st, The party applying must be a member of that body or tenant of that manor of whose books he seeks the inspection. *Vide Hodges v. Atkis*, 3 *Wils.* 398. 2 *Black.* 877. S. C. *Mayor, &c. of Exeter v. Coleman*, *Barnes* 238. *Anon.* 2 *Vex.* 620. *Shelling v. Farmer*, ante 646. *Murray v. Thornhill*, ante 717. *Rex v. Doctor Bridgeman*, ante 1203. *Allan v. Tap*, 2 *Black. Rep.* 850. *Wood v. Whitcomb*, 12 *Vin. Abr.* 146. pl. 9. *Lewis v. Baker*, 1 *Barnard. B. R.* 100. *College of Physicians v. Doctor West*, *Gilb. Rep. B. R.* 134. *Bishop of Hereford v. Duke of Bridgewater*, *Bunb.* 269. *Smith v. Davis*, 1 *Wils.* 104. *Talbot v. Villebois*, cited 3 *Term Rep.* 142. *Cox v. Copping*, 5 *Mod.* 395. 1 *Ld. Raym.* 337. *Turner v. Getbin*, 12 *Vin.* 147. pl. 11. But in *Mayor of Lynn v. Denton*, 1

Term Rep. 689. *Corporation of Barnstaple v. Latbey*, 3 *Term Rep.* 303. in *B. R. Mayor, &c. of London v. Mayor, &c. of Lynn*, 1 *H. Black.* 211. in *C. B.* the court seems to have over-ruled the cases of *Hodges v. Atkis*, 3 *Wils.* 398. and *Mayor, &c. of Exeter v. Coleman*, *Barnes* 238, and to have held that in such actions as are brought to support claims of duties made by corporations upon the public, of the validity of which the best evidence must be in the documents of the corporation, and of which documents equity would grant an inspection; Such for instance, as claims of rolls, that in these cases individuals who are interested to dispute their claims have an interest in the books which will intitle them upon motion to an inspection of the entries relating to the subject matter of the litigation. But these determinations seem to carry the rule no further than cases of this sort even in disputes between the corporation and strangers. And they do not decide that strangers have a general right similar to that which members of the corporation enjoy, viz. to inspect the books in actions between them and third persons. Or, 2d. if the parties applying be not members, such books must be the common evidence of the transactions between them and it, so as in fact to be for this purpose the books of both. Such are the cases of entries in the Custom-house books of the India Company and Bank stock, and transfer books. *Cox v. Hopkins*, 2 *Ld. Raym.* 851. *Warriner v. Giles*, 954. *Cru tam v. Saunders*, ante 1005. But they have met with no instance of a mandamus to compel the inspection of books of this kind. The evidence contained in them must be directly material in the cause, and the party applying

ally have the inspection and copying of such things as relate to himself. *Benson v. Port*, Mich. 2 Geo. 2. cited 1 *Wils.* 240. 1 *Black. Rep.* 40. S. C. *Mayor of London v. Swinland*, 1 *Barnard.* R. 455. *Crew qui tam v. Saunders*, *ut supra*, and this though corporator, *Rex v. Babb*, 3 *Term Rep.* 581. and the present case. It does not seem settled how corporators have a right to apply for a *mandamus* for a general inspection and copying of the books of the corporation. *Vide Rex v. G. Babb*, 3 *Term Rep.* 579. But tenants of a manor have this right as to the court rolls, &c. *Rex v. Shelly*, 3 *Term Rep.* 141. As to the stage of the cause, in which the court will grant the motion, as being enabled to judge whether an inspection is material, *vide Groenwoelt v. Burrell*, 1 *Ld. Raym.* 553. *Hodges v. Atkis*, 2 *Black.* 577. *Rex v. Hollister*, Ca. temp. Hard. 245. *Rex v. Justices of Surrey*, Say. 145. *Rex v. G. Babb*, 3 *Term Rep.* 579. 4th, The court will not oblige the custodees of such books to give the prosecutor an inspection and copy of things necessary to support a criminal prosecution, *Rex v. Worsenham*, 1 *Ld. Raym.* 705. *Crew qui tam v. Saunders*, ante 1005. *Rex v. Corneilius*, ante 1210. *Regina v. Mead*, 1 *Ld. Raym.* 927. *Rex v. Doctor Purnell*, 1 *Wils.* 329. 1 *Black. Rep.* 37. S. C. *Rex v. Lee*, cited *Ib.* *Bradshaw v. Phillips*, cited *Ib.* 39. *Rex v. Heydon*, 1 *Black. Rep.* 351. *Rex v. Harvey*, 4 *Burr.* 2489. The court however will grant such a rule to the relator in an information, in the nature of a *quo warranto*, if he be a member of the corporation, for it is in the nature of a civil proceeding, *Rex v. Shelly*, 3 *Term Rep.* 141. But I have not been able to meet with any case expressly deciding that even a partial inspection shall be permitted to a relator who is not so. The rea-

soning of the judges however in *Rex v. G. Babb*, 3 *Term Rep.* 581. seems to take it for granted that he has such right. And this is perhaps founded, as well upon the principle that these books may contain the only evidence upon the question, as also because the crown is not merely nominally, but materially concerned in the prosecution, since every intrusion into a corporate body is an usurpation upon the prerogative, and the king as the head and origin, is to be considered as a member of all lay corporations. THIRDLY, It seems the court will grant this rule, when an instrument of which it is not usual to have a counterpart, is lodged in the hands of a private person, as a general and common custodee for the parties interested in it, and that though the action is brought against himself, *Gracewood v. Barnes* 439. *Goater v. Nunnely*, ante 1130. *Sed vide Wood v. Apprice*, 6 *Mod.* 254. *Stock v. Bell*, 1 *Barnard B. R.* 466. FOURTHLY, Every person has a right to a copy of those proceedings of limited jurisdictions which are had against himself, where it is necessary in a suit instituted either by or against him. *Rex v. Smith*, ante 126. 12 *Vin.* 194. pl. 68. S. C. *Brewers' Company v. Benson*, *Barnes* 236. This seems limited by some decisions to cases where the custodees of the books are parties to the action. *Groenwoelt v. Burrell*, 1 *Ld. Raym.* 252. *Salk.* 144. S. C. *Aberry v. Dickenson*. Say. Rep. 250. but *Watson v. Rogers*, post. 1242. *Edwards v. Vesey*, And. 128. make no such distinction. But the books of a private company cannot be inspected any more than those of a private individual, *Smith v. Huggins*, *Barnes* 236. *Regina v. Mead ut supra*. *Charitable Corporation v. Woodcroft*, Ca. temp. Hard. 130.

Easter Term

18 Georgii 2 Regis. In B. R.

Sir William Lee, Knt. Chief Justice,

Martin Wright, Esq;

Thomas Denison, Esq;

Sir Michael Foster, Knt.

} *Justices,*

Sir Dudley Ryder, Knt. Attorney General.

The Hon. William Murray, Solicitor General,

Wilkes vers. Broadbent.

If any part of a custom as laid be unreasonable, the whole will be void. 1 Will. 63. S. C.

ERROR of a judgment in *Communi Banco*, where in trespass the defendant justified under a custom, that when the lord of the manor of *Halton*, or his tenants of the collieries, have sunk pits within the freehold lands, for working them, they have used time out of mind to throw the earth, stones, coals, &c. coming therefrom together in heaps on the land near such pits, such land being customary tenement and parcel of the manor, there to remain and continue; and to lay and continue wood there for the necessary use of the pits; and to take and carry away in carts, &c. part of the coals laid there, and to burn and make into cinders other part of the coals so laid there, at his and their free wills and pleasures. And issue being joined on the custom, there was a verdict for the defendant. But the court of Common Pleas being of opinion, it was a valid custom, as laid, gave judgment for the plaintiff upon the insufficiency

efficiency of the bar (1); and a trespass being thereby acknowledged, whereon a writ of inquiry issued, he had final judgment for his damages and costs.

And after several arguments in *Bancò Regis*, the Chief Justice delivered the resolution of the court for affirming the judgment.

The question he said was, whether this was a reasonable *lex*; which they held it not to be, inasmuch as it laid a great burden upon the land of the plaintiff, without any consideration appearing, either publick or private. That it favoured of an arbitrary power, and might (as laid) put it in the power of the lord, totally to deprive the tenant of the benefit of the land, there being no restriction in time, and the word *near* was too vague and uncertain. And though many cases were cited out of *Davis* 32 *b.* as turning the plow on another's land, coming there to dry nets, erecting light-houses, blowing up houses, and the like; yet those were all cases of necessity, and single points; whereas here it consists of great variety, some of which are not necessary, particularly that of burning cinders: and if any part of the custom be bad, it avoids the whole. 4 *Co.* 21. 2 *Ric.* 3. 1 *Roll. Abr.* 560. *pl.* 1. 21 *Ed.* 4. 8. *b.* *Litt.* § 212. *Litt. Rep.* 233. *Het.* 126. *Hutt.* 101. *Palm.* 212. 1 *Leon.* 1. 2 *Roll. Abr.* 266. the case of claiming a warren in all the lands, held ill.

(1) It was also made a question whether the judgment was rightly given upon the plea and not upon the verdict; and it was held that it was rightly entered, *Carth.* 272 or 307. 27 *Ed.* 4. *Bar. fo.* 462. *Roll. Abr.* 99. were cited, 1 *Wilf.* 65.

between the Parishes of Sheephead in Leicestershire and Melborne in Derbyshire.

A Person was certificated from *Sheephead* to *Melborne*, and stayed there ten years; during which time the Lady *Elizabeth Hastings* conveyed lands to trustees for several charities out of the profits, and (*inter alia*) the sum of 10 *l.* *per annum* to the charity-school at *Melborne*, to be paid to the vicar there for the same being. In a special order of sessions it was stated, that the certificate-man officiated as school-master several years, and received the 10 *l.* *per annum* from the vicar: and this the sessions held gained him a settlement in *Melborne*, where they declare he had a freehold estate.

Officiating as school-master and receiving 10 *l.* *per ann.* does not gain a settlement. *Burr. Sett. Cas.* 244. and 1 *Wilf.* Rep. 87. S. C.

Et

Et per curiam, The order must be quashed: for it does not appear how he came into this employment, and the legal right to receive the salary is in the vicar, who not caring to officiate himself, has therefore paid it over to this man as his deputy; which could never give any person a settlement, much less to a certificate-man (1).

(1) In the other reports it is stated that a schoolmaster is not an annual office.

[1226]

Wightman *vers.* Mullens.

In escape it must appear the commitment is of record.

IN an action against the marshal for an escape, it was laid, that the prisoner being brought before Sir *William Chapple*, one of the Justices of our Lord the King, at his chambers in *Serjeant's-Inn*, was there committed to the custody of the marshal at the suit of the plaintiff, as by the said commitment may more at large appear.

One of the king's justices does not import a judge of B. R.
Ante 1180.

To this the defendant demurred, and shewed for cause, that it did not appear the commitment was of record. And on argument the court held it ill; for he is not in point of law in the marshal's custody, till the commitment is entered on record: nor can the court take notice that Sir *William Chapple* had any power to commit him, he being only styled one of the justices of the King, which every common justice of the peace is.

Claphamson *vers.* Bowman.

As he believes, is not sufficient for bail. Ante 1157, 1209.

THE plaintiff's book-keeper swore, that the defendant was indebted to the plaintiff in 3,400 *l.* for money lent and received by the defendant to the use of the plaintiff, as the deponent verily believes. And the court held it not sufficient, to hold the defendant to special bail.

Dominus Rex *vers.* Freeman.

In an indictment for a rescue it must appear for what the party was committed to the house of correction.
2 Hawk. P. C. c. 23. s. 57. p. 320.

THE defendant was convicted, for that the keeper of the house of correction having *A.* in his custody, who was committed by virtue of a justice of peace's warrant, the defendant unlawfully rescued him, and the court arrested the judgment, it not being shewn for what *A.* was committed, so as to make the house of correction a proper prison (which prison is not for all offences) and also because the court cannot give a proper punishment on so general a charge.

Mr Watkin Williams Wynne, Baronet, *vers.* William Middleton, Esq.

THIS was an action on the statute 7 & 8 W. 3. c. 7. against the defendant as sheriff of *Denbighshire* for a false return on an election for a knight of the shire, in which the plaintiff recovered his double damages and costs: of which judgment error was brought. And now the plaintiff moved to amend, by adding a continuance, and a *misericordia*; the want thereof it was apprehended would not be aided, if this was deemed a penal statute. It was for that reason opposed, actions upon penal statutes being excepted out of the statutes of jeofails. *per curiam*, There is nothing excepted out of the statute Hen. 6. c. 12. (which is properly a statute of amendment,) but appeals and indictments of treason and felony. And in a case of this sort, *Trin. 1 Geo. 1. in Banco Regis, Phillips v. Smith*, amendments were made: the plaintiff therefore is at liberty to assign errors *de novo* (1).

Amendment.
1 Will. 125. S.C.
in Cam. Scac.

Vide Cowp: 337.
392.
Ante 843.
Ante 136. 734.

(1) *Anon. B. R. 1 Will. 256. Vide also in Bennet qui tam v. Smith, 1 Burr. 402.*

Dominus Rex vers. Elizabeth Niccolls.

SHE was indicted at *Hicks's Hall*, for conspiring with Edward Bygrave, unjustly to charge William Frankland with a robbery, and for that purpose going before a justice of peace, where Bygrave swore it upon him; Niccolls only came in and pleaded Not guilty. And the jury found that she was guilty, but that Bygrave died before the indictment was preferred. Before any judgment was given at the sessions, she brought a *certiorari*, and the cause was set down to be argued.

One conspirator
may be convicted
after the other
is dead.

The first thing determined was, that this being in the nature of a special verdict, that there was no occasion for the defendant's appearing in court upon the argument: for she is not considered as convicted, till after the court have determined upon the verdict. And it was therefore not within the reason of the case moving for a new trial, or in arrest of judgment; where there being a general verdict, it created such a presumption of guilt, that the party cannot move with ~~amendment~~ *present* in court,

It then came on upon the merits; when exception was taken, that one alone cannot be guilty of a conspiracy, and here is but one convicted: but the court over-ruled this, on the authority of

of *Kinnerley's* case, (*ante* 193.) where judgment was given against him before the other had pleaded; so that there was no possibility of contradictory verdicts, which cannot be had. And I cited 1 *Vent.* 234. 24 *Ed.* 3. 34. b. 24 *Ed.* 3. 73. in point (1).

A verdict cannot be removed from the sessions before judgment. (2).

But then a doubt arose, what the court could do, the *certiorari* being brought before judgment; and this court not being apprized of the circumstances of the offence, could not tell what judgment to give; and in *Carth.* 6. it is said, they cannot give judgment. A rule therefore was made, to shew cause why the *certiorari* should not be quashed, so as to remit it back to the sessions; which was afterwards made absolute.

(1) *Vide* also *Rex v. Scott*, 3 *Burr.* 1262. S. P. upon an indictment for a riot. (2) *Vide* *Rex v. Gwinne*, 2 *Ld. Raym.* 749. *Rex v. Elwell*, *ante* 794.

Sargent *vers.* Reed.

Prescription to take three bushels out of every ship's cargo of barley for keyage is good.

2 *Wils.* 91. S. C. The prescription in a MSS report omits the words in capitals, in other respects it corresponds, but the report in *Wils.* agrees with the present one.

TRESPASS for taking three bushels of barley; the defendant pleads, That *Richard Daniel* being seised in fee of the manor of *Penzance*, of which the pier or key was parcel, and all those whose estate he had, at their own costs had used and ought to repair it, and had of right taken a reasonable duty called *Bushelage*, (*viz.*) three *WINCHESTER* bushels of barley OUT OF AND for every ship's cargo of barley brought upon the key to be exported IN ANY SHIP; and that he by bargain and sale for the considerations therein mentioned, sold it to the corporation of *Penzance*, to hold to them and their successors in fee farm forever, by virtue whereof they became and yet are seised of the premises in their demesne as of fee: then he shews, that the plaintiff brought upon the key a cargo of barley, consisting of 1200 *Winchester* bushels, out of which he as servant of the corporation, and by their command, took the three bushels as by law he might. The plaintiff by his replication denies the prescription: and issue being joined, it went down to trial, and there was a verdict for the defendant.

It was now moved in arrest of judgment, that the prescription was unreasonable and uncertain, the word *cargo* being general; and three bushels out of a small parcel, as well as a large one, not being a reasonable proportion. And 2 *Lev.* 9. *Raym.* 233. were cited,

To this it was answered, and resolved by the court, that the word *cargo* as referred to a ship, was very intelligible, and must mean the whole loading. It may as well be said that the word *ship* is uncertain, one being much bigger than another; and there are many cases where words as general have been allowed. *Mod.* 319. *Stil.* 224. 358. 1 *Vent.* 114. 1 *Sid.* 98. *Cro.* [1229]
ac. 307. 1 *Bulst.* 126. 2 *Vent.* 67, 78. 2 *Sid.* 174. *Lutw.*
 519. *Hob.* 85.

Another exception taken, was to the manner of setting out the title of the corporation, the bargain and sale being only said to be for the considerations therein mentioned, whereas it ought to appear to have been for a money, or valuable consideration, according to 1 *Leo.* 170. *Mo.* 569. 1 *Co. Mildmay's* case. 3 *Lev.* 233.

Pleading a bargain and sale without shewing it to be for a valuable consideration will be ill upon demurrer, but cured by verdict or taking issue on a collateral fact.

To this it was answered, that the cases cited were upon demurrer; but this is after a verdict, when it being laid, that *virte inde* the corporation was seised, the court must take it, that there was a proper consideration: besides, it is laid to be *in fee-farm*, which imports the payment of money: and 27 *Hen.* 8. 16. doth not require a money consideration. In *Mo.* 504. it is said, that it shall be implied in pleading, unless the contrary appears: and though the verdict is upon the prescription, and not on the conveyance; yet it is as strong against the plaintiff, being in the nature of a *nient dedire*.

The court seemed to think this way of pleading it would be upon a demurrer (1), but was now cured; it not being a defective title, but a title defectively set out, according to *Salk.* 65. (2) And the rule to shew cause was discharged.

(1) That is a special demurrer, *Vide Bolton v. Bishop of Carlisle*, *H. Black.* 261.

(2) *Stream v. Seyer*, 1 *Lord Raym.* 111. S. P. *Vide Bolton v. Bishop of Carlisle*, *ut supra*.

Dominus Rex *vers.* Thomas Broughton.

ON an indictment for perjury, the case appeared to be, that one *Wharram* employed the defendant's brother *James* to sell an estate for him that lay at a distance, whom *Wharram* charged to have sunk 700*l.* of the purchase money, and filed a bill, and obtained a decree for an account, upon the oath of an imposition: after this *James Broughton*, pretending to have found a written account, wherein he had given *Wharram* credit for the 700*l.* reheard the cause, and examined the defendant,

Party supposed to be defrauded allowed a witness in perjury.

No conviction for perjury on the oath of a single witness.

[1230]

feudant, who swore that the account was sent to him by his brother into *Yorkshire* to shew *Wharram*, which he did: and *Wharram* owned it to be his hand, and declared he had forged it. The Chancellor was of opinion, this account was a forgery; and therefore did not vary his decree: but recommended the prosecution of *James*, who thereupon ran away: *Wharram* then indicted the defendant for perjury, and offered himself as witness; which I opposed, on the authority of *Dominus Rex v. Nunez*, (*ante* 1043.) and *Dominus Rex v. Ellis*, (*ante* 1104.) and the case of *The King v. Whiting* in *Salk.* 283.

The Chief Justice declared, he was for hearing the evidence of *Wharram*, because as no bill of exceptions would lie, the prosecutor would otherwise be without remedy, whereas the defendant if convicted might move for a new trial: but he said he would give no opinion at present, further than observing, that in *Nunez's* case the suit in the Exchequer was then depending, whereas the suit here in Equity seemed to be at an end (1).

Whereupon *Wharram* was examined, and contradicted the defendant in all the parts of his examination; but being only single witness on the point of the perjury, I insisted, there was no occasion to go into our defence. And the Chief Justice being of that opinion, the defendant was acquitted (2).

(1) *Vide Wells's* case, *Buller's* L. N. P. 289. *Rex v. Ellis*, *ante* 1104, and the note. But in an indictment for perjury, *Ld. Kenyon* C. J. held, that the defendant in the original action against whom the verdict went was an incompe-

tent witness, he not having paid the debt and costs. *Rex v. Ellis* Hil. 34 Geo. 3. *Espinasse's* Case. *Ni. Pri.* 97.

(2) *Regina v. Muscat*, 10 M. 194. acc.

Trinity Term

18 Georgii 2. Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Martin Wright, *Esq;*

Thomas Denison, *Esq;*

Sir Michael Foster, *Knt.*

} *Justices.*

Sir Dudley Ryder, *Knt. Attorney General.*

The Hon. William Murray, Solicitor General.

Dominus Rex vers. Bambridge.

A Woman exhibited articles of the peace, stiling herself the wife of the defendant, setting out acts of cruelty, and the pendency of a suit in the ecclesiastical court for restitution of conjugal rights. The defendant coming to put in bail, insisted the recognizance should not be taken so as to carry any admission of the marriage. And the court ordered it should run thus, "To keep the peace towards our Sovereign Lord the King, and all his liege people, and particularly towards *Hannah Penn*, who hath exhibited articles of the peace against him the said *James Bambridge*, by the name of *Hannah Bambridge* wife of him the said *James*, and that he shall not depart the court without leave, &c."

How to take security of the peace where a marriage is disputed.

Walker *vers.* Robinson.

Certificate on
44 Eliz. against
costs (1).
2 Wils. 93..
S. C. more full.

IN trespass for an assault and taking a rope, the jury gave 18*d.* damages. And Mr. Justice *Burnet*, who tried the cause, certified his approbation of the verdict, according to 44 Eliz. c. 6. in order to prevent costs. The plaintiff however moved (as it was a new case) for costs *de incremento*, pretending here was an asportation, which on 22 & 23 Car. 2. c. 9. has been always held to carry costs. But the court in this case refused it, for the 43 Eliz. takes in all but a few excepted cases of which this is not one. And though it has not been usual to grant a certificate on this act, yet we have often known it threatened. And in the case of *White v. Smith* in C. B. Pasch. 17 Geo. 2. Chief Justice *Willes*, in an action for taking sand on *Hounslow-heath*, did certify, and prevented costs.

(1) *Vide Howard v. Cheshire*, 2 Wils. 258. *Dand v. Sexton*, Say. Rep. 250. *Bartlet v. Robins*, Term Rep. 37.

Between the Parishes of Saint Peter in Sandwich and Goolaston in Kent.

Servant going to sea with his master's leave, and finding another to do his work, is settled. Burr. Sett. Ca. 251. S. C.

A Servant was hired for a year, during which he, with his master's leave, went to sea upon the herring fishery, but hired another to do his work in the mean time: he returned at the end of three weeks after the expiration of his year, settled with his master, and received his whole year's wages.

This the Sessions held was not a service for a year; but the court, on the authority of the case of *Islip* (ante 423.) and *Beck v. Leesloff*, (ante 1207.) held it a settlement; saying he was to be considered all the while as in the service of his master (1) and the person he found to do his work was his servant, and not the master's: wherefore the order was quashed.

(1) *Rex v. Iwinghoe*, ante 92. S. P. per Pratt C. J.

The Weavers' Company, *qui tam*, *vers.* Forrest.

May declare *qui tam* tho' the process is not so. Post 1241.

A Bill of *Middlesex* was, to answer to the Weavers' Company and the declaration was in the name of the company, *qui tam* for themselves and the poor of a parish where the offence was committed: it was moved therefore to stay the proceedings because the declaration differed from the process; but the court

held it right, it not being usual to insert in the bill of *Middlesex* on what account or in what right the party sues, as in the case of executors and administrators, the case of an assignee of a bail-bond, and the like, where the process is only *ad respondendum* to *A. B.* (1).

Then exception was taken to the notice at the bottom of the process, which was only to appear at the return thereof, being the 14th of *June* without saying this instant, or expressing the year of our Lord, or of the King: but the court said, it must be understood the next 14th of *June*, and held it right.

[1233]
English notice on process need not express the year (2).

(1) *Lloyd v. Williams*, 2 Black. 722. 3 Wilf. 141. S. P. in *C. B.* But it would have been otherwise if the process had been to answer the plaintiff *qui tam*, &c. and the declaration had been in his own name, *Canning v. Davis*, B. R. 4 Burr. 2417. *Canning v. Davis*, S. P. in *C. B.* Barnes 494. *Meggs Assignee v. Ford*. E. 25 Geo. 3.

Imp. Prac. K. B. 172. Vide also *Turing v. Jones*, 5 Term Rep. 402. (2) *Wingfield v. Beard*, Barnes 419. *White v. Washington*, Prac. Reg. 347, are contra as to the practice in *C. B.* But a latter determination in *Elliot v. Parrot*, Barnes 225, overrules these cases, and agrees with the present decision.

Between the Parishes of Maidstone and *Hedcome in Kent.

MAIDSTONE certificated *Richard Burden* and *Mary* his wife, who came therewith into *Hedcome*, and had four children. And upon his becoming actually chargeable, they were all sent back to *Maidstone* by an order of two justices of the peace.

* Should be *Headcorn*. Burr. Sett. Cas. 253. pl. 86. note to 2d Ed. Certificate conclusive to the parish that gives it. Burr. Sett. Ca. 251. 233. and Sett. Ca. Ed. 1750. vol. 2. p. 391. No. 206. S. C.

Upon appeal to the sessions, it was stated, that the man in 1715. lawfully intermarried with *Mary Lee*, who then appeared in court, and by whom he had several children, who were all maintained at *Maidstone*, as the wife and children. That in 1730. he (in fact) married *Mary Bromhall*, who was the woman that removed with him to *Hedcome*, and is the same that was now sent back to *Maidstone*; but the sessions considering they were both called *Mary*, and that *Maidstone* actually maintains *Mary* the real wife, and all her children; were of opinion, the others were not to be sent back to *Maidstone*; and therefore confirmed the order of the two justices as to the man, and quashed it as to the woman and the children of the second marriage.

VOL. II,

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And now on debate in *B. R.* it was held, that the two justices of the peace had done right in sending them all back to *Maidstone*, for the certificate is conclusive to *Maidstone*: and upon the fact stated, it does sufficiently appear, what *Mary* was that was meant by the certificate: and that this case did not differ from that of *New Windsor* and *White Waltham* (*ante* 186.) nor did it alter the case, that *Maidstone* had the real wife and children to maintain also: they therefore confirmed the order of sessions as to the man, quashed it as to the rest, and confirmed the order of the two justices of the peace *in toto*.

[1234]

Turner *vers.* Schomberg.

Where common bail.

Ante 1218.

*16 G. 2. c. 17. s. 18.

† See Barnes 813

82 on 11 G. 2.

c. 9. n. to 2d

Ed.

THE defendant gave his note for 36 *l.* He was afterwards discharged on the insolvent debtors act*: afterwards meeting the plaintiff, he promised to pay the debt at two guineas per month, and paid twelve guineas accordingly. And being now sued for † the rest, the court discharged him on common bail saying it was no new consideration, but the old debt (1).

(1) S. P. Where a promise ruptcy, and the debt prior. *Bail* was made subsequent to bank- *v. Dillon*, 2 *Burr.* 736.

Webb *vers.* Holt.

Practice as to pleading as will stand by.

THE defendant pleading a sham plea; the plaintiff obtained the common rule, that the defendant should plead *remptorily* on the morrow, and that such plea shall not be waived; and served it on the defendant's attorney, who taking no notice of it, the plaintiff after the day was out, signed judgment: which the court on the master's report held to be irregular, the first plea standing, if the defendant did not lay hold of the opportunity given him of altering it, whereby the plaintiff has the benefit of his motion.

Dominus Rex *vers.* Hendricks,

B. R. will not grant information for usury after the suit is lapsed to the crown.
MSS. S. C.

BY 12 *Ann.* c. 16. the treble value is recoverable on a usurious contract, one moiety to the crown, and the other to him that will sue for the same. By 31 *Eliz.* c. 5. s. 5. a common informer is limited to a year after the offence committed, and if no such suit is brought within the year, then the crown may sue at any time within two years after the end of the first year.

In this case the year was expired; but within the other two years, I moved upon proper affidavits, for an information, and obtained a rule to shew cause: but the court afterwards discharged it, being of opinion, that it was a matter left to the discretion of the crown, which the court had not power to exercise: and there never was an instance, where for a penalty vested in the crown only, this court ever granted an information; but they are always filed by the Attorney General, who is the proper officer in those cases.

Marsh et al', Assignees of May a Bankrupt, *vers.* Chambers.

IN assumpsit the defendant was proved to be indebted to the bankrupt in 208*l.* By a set off, and bringing money into court, this whole demand would be discharged, if the defendant was intitled to be allowed 127*l.* upon a note of the bankrupt's, which he claimed as indorsee, the case as to which was thus;

Note indorsed to a debtor of a bankrupt after the bankruptcy cannot be set off.
Tri. at N. Pri.
167.

One *Scott* who was possessed of this note at the time of the bankruptcy, applied to the defendant, who he knew owed more money to the bankrupt's estate, desiring him to take the note and claim a credit for it, on settling with the assignees, according to 5 Geo. 2. c. 30. The defendant scrupled it, and the bankrupt would not consent; but at last the defendant ventured, upon *Scott's* indorsement (who he said was a good man) to pay the 127*l.* and upon notice to set off, produced the note. I opposed its being allowed, it appearing to be an indorsement after the bankruptcy, whereas the words of the act are mutual debts *before*; and as it was an unjust attempt in *Scott*, to get 127*l.* in the pound. But the Chief Justice considering it might be dangerous to inquire into the precise time of indorsing negotiable notes, directed the jury to allow it; which with much difficulty, and merely in deference to his opinion, they did. But upon motion for a new trial the verdict was set aside, with the concurrence of the Chief Justice, the words of the act being before stated, and the defendant having no right to stand in a better condition than *Scott*, who could only come in for a dividend: besides, it would be of ill consequence in trade, if creditors to the bankrupt's estate should be allowed to buy up debts, in order to set them off in this manner. They gave no opinion how it would be, if the nature of the transaction and the time of the actual indorsement did not appear.

[1235]

1 Will. Rep.
782.

Dominus Rex *vers.* Sir Henry Penrice.

Return is good
if it pursues the
suggestion of the
writ.

MANDAMUS, suggesting that *Matthew Hubbard* was in *Easter* week chosen churchwarden of *Heston*, and commanding the defendant to swear him in, or shew cause to the contrary. To this he returned, that *Hubbard* was not elected in *Easter* week, and that upon his offering to swear him in, *Hubbard* refused to accept the office.

To this I excepted, for that the return had confined it to a particular time, and was in the nature of a negative pregnant, for he might be chosen at some other time; and returns (which are not traversable) must be certain to every intent. *Salk.* 432. And *Hubbard's* refusal could be no reason, for he might change his mind, and the parish had an interest in making him serve the office. And the court held the latter part of the return insignificant; but as to the first exception, they held it good, and it pursued the suggestion of the writ (1), and therefore allowed the return.

(1) *Rex v. Hill*, 1 *Show.* 253. S. P.Sparrow *vers.* Caruthers.

[1236]

Goods lost after
the owner has
taken them from
the ship into a
lighter is no
charge on the
insurer.
Park on Mar.
Insur. 23.

Ante 690.

THE defendant insured goods to *London*, and until the same should be safely landed there. The ship arrived in the port of *London*, and the owner of the goods sent his lighter, and received the goods out of the ship: but before they reached land, an accident happened whereby the goods were damaged; for which this action was brought against the insurer. For the defendant it was insisted upon, that the accident happening after the owner had taken the goods into his possession, it was a loss after the insurance was ended. To which I answered, that if this had been an action against the master or owners of the ship, that would have been a good answer; for they were certainly discharged; but in this action it could be no answer, for during all the voyage it might as well be said the goods were in the possession of the assured, who took the ship to freight, and whose servant the master was to this purpose, as much as the lighterman: and these words are put into policies, to guard against all sorts of losses, till there is an actual landing; because in the case of ships of great burthen, that are forced to go off, there may be a carriage for many miles in boats or lighters, and it was in the course of trade for the owner of the goods to send his lighter. But the Chief Justice held, the insurer was discharged. He said it would have been otherwise, had the goods been sent by the ship's boat, which is considered as part of the ship and voyage. And the jury (which was of merchants expressing, they thought it turned upon that distinction, brought in a verdict as to this point against the plaintiff.

Michaelmas Term

19 Georgii 2 Regis. In B. R.

Sir William Lee, Knt. Chief Justice.

Sir Martin Wright, Knt.

Sir Thomas Denison, Knt.

Sir Michael Foster, Knt.

} *Justices.*

Sir Dudley Ryder, Knt. Attorney General.

The Hon. William Murray, Solicitor General.

Finch et ux' vers. Duddin et ux'.

IN an action for a battery of the plaintiff's wife by the defendant's wife, there was judgment for the plaintiffs, and the wife of the defendant was only taken in execution. She moved to be discharged, but upon affidavits of endeavors to take the husband, and it not appearing there was any design to screen him, the court refused it, on the authority of *Pitt v. Meller et ux'*, ante 1167.

Baron and Feme,
Mich. 20 G. 2.
Langstaffe v.
Rains et ux',
the same point
ruled again.

Henbury vers. Rose.

ON the back of the issue was wrote, *Take notice of trial at the Practice next assizes.* And though there was no date, or county, or attorney's name mentioned; yet being on the back of the issue, the court held it good; but that it would not be so on a separate paper.

Mattison *qui tam* *vers.* Allanson.New trial where
not grantable.Ld. Raym. 63.
2 Keb. 226.

AN action was brought upon the late statute against horseracing for the penalty; and the jury found a verdict for the defendant, contrary to plain evidence; and the court denied a new trial, there being no proof of any misbehaviour in the defendant, or tampering with the jury (1). And this was within the reason of cases in the Exchequer where verdicts for defendants are never set aside for penalties in the case of duties; and this is excepted out of the statute of jeofails, as much as indictments (2).

- (1) *Seymour Bart qui tam v. Day*, formations grounded on penal statutes are amendable. *Vide* 1 Com. ante 839.
(2) How far actions and in- Dig. Amendment (262.) 485.

Cary *vers.* Holt.In trespass the
plaintiff need
only falsify the
defendant's title.(a) Rep. Fort.
378.

THE plaintiff declared in trespass upon his possession; the defendant makes title, and gives colour to the plaintiff the plaintiff replies, *de injuria sua propria*, and traverses the title set out by the defendant; and upon demurrer, and on the authority of *Goslin v. Williams*, P. 5 Geo. 1. (a) the court held this good replication; for it lays the defendant's title out of the case, and then it stands upon the plaintiff's possession, which is enough against a wrong doer; and the plaintiff need not reply title. Judgment *pro quer.* (1).

- (1) *Vide Vernon v. Goodrick*, ante 5. Bull. L. N. P. 93.

The Mayor, &c. of Northampton *vers.* Thomas Ward.Erecting a stall
in a market is
not of common
right, and tres-
pass is the pro-
per remedy for
so doing (1).

THE plaintiffs declare for a trespass committed by the defendant in breaking and entering their close called the *Butcher Row*, and erecting a stall there. The defendant pleads several pleas, which went to issue, and were found against him.

- 2 Will. 107. S. C. with the last argument at the bar.

- (1) So trespass lies for placing tables, stools, &c. in a market place for sale without leave of the owner of the soil. *The Mayor of Norwich v. Swan*, 2 Black. 110.

But his third plea was, that there is a publick market held every Saturday in the *locus in quo* for selling of butchers meat; wherefore he entered the market with his meat, in order to sell it, and for that purpose erected a stall in the open market, for the necessary exposing his meat to sale, and laid his meat upon the stall, *prout ei bene licuit, quæ est eadem, &c.* The plaintiffs replied, that they were seised in fee of the close and market, and that the defendant without their licence, and of his own wrong, entered and set up the stall. To this there was a frivolous rejoinder, and a demurrer.

It was three times argued at the bar, and insisted on for the defendant, that he had not only a right to come into the market, but also to erect a stall there; and that if he had not, yet trespass was not the proper remedy.

[1239]

And now *Lee C. J.* delivered the resolution of the court.

As to the first point, they were all of opinion, that though every person has of common right a liberty of coming into a publick market for the purpose of buying and selling; yet he has not of common right a liberty of placing a stall there, but he must acquire that by a compensation, which is called stallage; and in *Blunt's Law Dictionary*, *Minsheu's*, *Boyer verbo Estallage*, and *Spelman's Glossary*, is defined to be a satisfaction to the owner of the soil, for the liberty of placing a stall upon it: and if in the erecting one the soil is broke, it is called *piccage*. And this of stallage is so fixed to the owner of the soil, that in *Mo. 474.* it is held to descend to the *Borough English* heir, though the right to hold the market goes to the eldest son. It is not properly a toll, which can only be due by grant or prescription; whereas stallage is demandable in the case of a new erected market; and the soil is no farther considered as dedicated to the publick, than the common right of entry goes. 2 *Inst.* 220. 1 *Ld. Raym.* 149.

As to the second point, they were all of opinion, that an action of trespass was the proper remedy for the owner of the soil, against one who wrongfully places a stall there: and he could have no other remedy; he could not distrain *damage feasant* (2), or if he could, it would not follow that trespass does not lie. He cannot bring debt or *assumpsit*, for there is no certain duty, or implied contract. *Spelman* says, the *stallagiator* must *facere redemptionem cum præposito burgi, secundum quod cum eo convenire poterit.*

(2) *Wigley v. Peachy*, 2 *Ld. Raym.* 1539. acc.

In all cases of exceeding the authority given by law, the party is a trespasser. 6 *Carpenter's case*, 8 Co. 2 Roll. Ab. 561. G. 1. And this is not so properly a non-seafance, as a mis-seafance. Though a man has a right to go into a church, yet he has no right to erect a pew there, without the direction of the ordinary.

They held therefore, that the plaintiffs had a right to satisfaction as owners of the soil, and that they had pursued the proper remedy: wherefore judgment was given for the plaintiffs.

[1240] Between the Parishes of Crofcombe and St. Cuthbert in Wells.

Servant removing with his master in the second year gains a settlement although there was no new hiring.

Burr. Sett. Ca. 356. S. C. much fuller.

A Servant was hired for and served a year in *Crofcombe*. He continued to serve on there without any new agreement for a quarter of a year, when the master removed into a house in *St. Cuthbert's*, where the servant continued with him for half a year, and then married. The question was, whether this was a settlement in *St. Cuthbert's* within the reason of those cases that have held the settlement to be gained where the last forty days service was? And the court held it a settlement there, for it is still a continuing in the same service within the meaning of 8 & 9 W. 3. c. 30. though there is no new agreement. And upon the whole there has been between this master and servant a hiring and service for above a year. *Ante* 1164.

Dominus Rex vers. Baker.

Conviction good where only laid that the evidence was read to the party (r):

I N a conviction for keeping a lottery-office contrary to the late statute, it was stated that *Jones* gave information before two justices, and *Martindale* a credible witness proved the fact, whereupon due summons issued, and the defendant appeared, and the information aforesaid, and the said evidence thereupon given, being now here read unto and fully understood by the said Francis Baker, he is asked what he has to say.

I objected, that it should appear, the evidence was given in the hearing of the defendant; whereas it was only read, whereby the defendant loses the benefit of a cross examination: but the court held it well enough, for all is a history in the presentment.

(1) *Rex v. Vipont*, 2 Burr. the observations upon this case 1163. seems contra. See also *Rex Boslawen on Convictions* 71. 72. *v. Crowther*, 1 Term Rep. 125. and

se, and supposed to pass at the same time : and if it had been read, it might be said to be only *bearing it read*. In these cases it is enough, that it does not appear to be wrong ; and it is laid to be fully understood by him. In the case of *Theed* on the middle act, it was held not to be necessary to aver the entry of the officer to be in the day-time, and not in the night, when the constable's presence would be necessary. The conviction was confirmed.

Ante 608.

The Weavers Company, *qui tam*, *vers.* Forrest, and Four Others, in separate Actions, ante 1232.

[1241]

THE company brought actions as common informers for the penalties in the statute 7 Geo. 2. c. 7. for selling printed *callico*, and set out their charter, to shew they had power to sue and be sued, with a *profert*. The defendants demanded a copy of the charter delivered to them ; after which they put in the general issue of *Nil debet* taking no notice of the *oyer*. The plaintiffs made up the issue, and inserted the *oyer* and *oyer* at the head of the pleas, and demanded to be paid for it ; upon which the court was moved to expunge it, for though the defendants had a right to see whether the plaintiffs sue, yet they are not bound to insert the *oyer*, but may plead the merits.

Defendant who has *oyer* is not bound to insert it in his plea. *N. B.* It was held in *C. B.* (where other like actions were brought) that the words of 7 Geo. 2. being *any person or persons*, a corporation could not sue as a common informer.

On the other side it was insisted, that the demand and giving is the act of the court, whose acts either party has a right to record. And *Cartbeu* 301. *Ld. Raym.* 969, 1055. 1 *Saund.* 680. 1 *Vent.* 37. 2 *Mod.* 189. *Cro. Jac.* 679. *Litt.* 260. *a.* were cited.

But the court held, that if the plaintiffs would avail themselves of the letters patent being set out at large, they ought to do it by praying them to be enrolled at the head of their replication, and ought not to do it at the defendant's expence, and therefore ordered the *oyer* to be expunged (1).

(1) *Vide The Weavers Company v. Forrest*, *C. B.* Mich. 8 Geo. 2. 327, is contra, and see *Stater v. Dutcheys of Cumberland*, *Term Rep.* 370. that if defendant after craving *oyer* of a deed

do not set forth the whole of it, the plaintiff may sign judgment as for want of a plea, or the court will quash it. *Stater v. Home*, *E. 34 Geo. 3. S.P.* 2 *Tidd's Prac. K. B.* 309.

Jones *vers.* Edwards.

Construction of the act for making landlords defendants in ejectment. S. C. cited 2 Burr. 757.

BY the statute 11 Geo. 2. c. 19. it is provided, that the landlord may make himself a defendant in ejectment, if the tenant refuses to appear; and though judgment is given against the casual ejector, the court shall order a stay of execution, until they make further order therein.

In this case, the landlord appeared without the tenant; and after a verdict for the plaintiff, he brought a writ of error, upon which the plaintiff moved to take out execution; which the court refused to grant, for though it is left to their discretion yet that can only be a legal one. The act intended to put the landlord in the place of the tenant, that he should not be stopped by any act of the tenant, and it ought to be considered as if the tenant had brought error, which would undoubtedly be *superfedeas*. This court cannot take upon them to judge, whether there is error in the proceedings or not (1).

[1242]

(1) *Farfide on the demise of Lord Sydney Beauchamp v. Hayley, S. P. in C. B. Barnes 208. and see George ex dem. Bradley v. Wisdom, that the landlord must assign this reason on the day for shewing* cause against the rule for leave to take out judgment against the casual ejector, or the court will permit him to open the matter again, 2 Burr. 757.

Forbes *vers.* Lord Middleton.

Defendant must search for a *concilium*. The plaintiff is not obliged to serve the rule when defendant demurs (1). Court will not set aside regular judgment upon payment of costs, to give the defendant the advantage of a nicety in pleading.

IN *assumpsit* the defendant pleaded the general issue, and the statute of limitations: the issue was found against him at the assizes; but as to the special plea there was a replication, joinder, and sur-rejoinder, to which the defendant demurred, and the plaintiff joined in demurrer. This term the plaintiff made it a *concilium*, put it in the paper, and no body appeared to support the demurrer, obtained judgment. It was now moved to set this aside as irregular, the rule for the *concilium* having never been served, or any notice given of putting it in the paper. But the court held it not to be irregular, and that it was the duty of the defendant to search, since he must expect the plaintiff would proceed. Then it was moved to set it aside upon payment of costs, upon the foot of setting aside regular judgment.

(1) *Vide Bland v. Darby, 3 Term Rep. 350.*

ents (2). But the court said, that was never to be done, but here the defendant was to plead to the merits; not to give him the advantage of a nicety in pleading. And if there was any ground for the demurrer, (as in fact there was) he might bring writ of error, but they would not relieve him, though he offered to waive a writ of error.

(2) *Fox v. Glass*, ante 823.

Dominus Rex vers. Magrath.

HE was committed for manslaughter. And it appearing to be no more, upon the depositions before the coroner, the court admitted him to bail, according to *Salk. 104. Trin. Geo. 2. Rex v. Dalton*, and *Mr. Clifton's case*.

The court will bail on depositions before the coroner.
Ante 911.

Wilson vers. Rogers et al'.

THE plaintiff was sued in the court of conscience in London, and was taken in execution, for which he brought writs of habeas corpus and false imprisonment; and now moved for liberty to inspect the book of the proceedings; which upon debate was granted, so far as related to the suit against himself only. Upon this ground, that every man has a right to look into the proceedings to which he is a party (1).

Access granted to books of court of conscience.

Ante 1223.
and the note.

(1) *Vide Edwards v. Vesey*, *for Burrell, &c. 1 Ld. Raym. 252. temp. Hard. 128. Brewers Carib. 421. Aberry v. Dickenson, Company v. Benson, Barnes 231. Say. Rep. 250. vide Deffor Groenvoelt v. Doc-*

De Balf vers. Mackensie.

[1243]

THE plaintiff recovered in the court of Meudon in France damages and costs for a malicious prosecution to 2,500 l. He arrested the defendant here, and held him to bail, on an affidavit of so much being due to him upon a judgment or decree. And the court held, this did not warrant holding to bail; for on a decree here there can be no bail, and whatever might be the case of a money debt contracted and sued for abroad; yet being a case of damages for a malicious prosecution, can never

There shall be common bail on a recovery in a foreign court.
Barnes 73.
which seems S. C.

never be construed to raise a debt here. So common bail was ordered (1).

(1) According to the report in *Barnes*, this point was not stirred, the judgment being void; for the sentence of *Mendon* was annulled by an appeal to a superior court; the practice of which was to annul the sentence of the inferior court, and proceed as in an original suit.

Massa vers. Dauling. At Guildhall.

Usury (1).

UPON usury pleaded to an action against the defendant as indorser of a note for 200*l.* The case was, that *Grace* took the note upon advancing 197*l.* when the note had three months to run, and at the three months end took another note for 200*l.* upon advancing 3*l.* for other three months. It was insisted, that this was not usury, being a purchase out and out of the notes: and both parties becoming bankrupt, and the commissioners refusing to let these notes be proved, a petition was preferred to the Lord Chancellor, who directed an issue upon them. And now *Lee* Chief Justice held, that this was usury within the meaning of the statute 12 *Ann. c. 16.* which prohibits taking more than 5*l. per cent.* upon any contract directly or indirectly: however he left it to the jury upon the question, whether this was to be deemed a purchase or a loan; who found it to be the latter, and the defendant had a verdict.

(1) *Vide Richards v. Brown*, and the cases collected in the 7th *Corp.* 770. *Loas v. Waller*, edit. 2 vol. 373. 6 *Com. Dig.* *Dougl.* 736. See further upon *Usury*. (A) 479, et seq. this subject, 1 *Hawk. P. C. ch. 82.*

Waples vers. Eames. At Guildhall.

Insurer is liable where ship goes back to perform quarantine.
Vide *Park on Mar. Insur.* 35.

THE ship *Success* was insured at and from *Leghorn* to the port of *London*, and till there moored twenty-four hours in good safety. She arrived 8th *July* at *Fresh-water*, and moored, but was the same day served with an order to go back to the *Hope* to perform a fourteen days quarantine. The master upon this deserted her, and on the 12th the captain applied to be excused going back, which petition was adjourned to the 28th, when the regency ordered her back; and on the 30th she

went back, performed the quarantine, and then sent up for orders to air the goods. But before she returned the ship was burnt on 23d *August*. And now the question was, whether the insurer was liable?

For the defendant it was insisted, that the ship arriving and being moored on 8th *July*, and remaining so till the 30th, here was a performance of what he had undertaken, and his risque ought not to be extended to so long a time as between 8th *July* and the burning 23d *August*.

But it was ruled, that though the ship was so long at her moorings, yet she could not be said to be there *in good safety*, which must mean the opportunity of unloading and discharging, whereas here she was arrested within the twenty-four hours, and the hands having deserted, and the regency taken time to consider the petition, there was no default in the master or owners. And it was proved that till the fourteen days were expired, there could be no application to air the goods. Wherefore the jury found for the plaintiff,

Hilary Term

19 Georgii 2 Regis. In B. R.

Sir William Lee, Knt. Chief Justice.

Sir Martin Wright, Knt.

Sir Thomas Denison, Knt.

Sir Michael Foster, Knt.

} *Justices.*

Sir Dudley Ryder, Knt. Attorney General.

The Hon. William Murray, Solicitor General.

Watkins *vers.* Hanbury.

One in execution may confess a new judgment without the presence of an attorney (1).

THE defendant being taken upon a *capias ad satisfaciendum* paid part of the debt, and gave a warrant of attorney confess a new judgment for the rest, upon time given him pay it. This was moved to be set aside, because no attorney was present on the part of the defendant when the warrant was executed, according to two standing rules of the court of *Car.* and 4 *Geo.* 2. the first of which indeed speaking of persons in custody on arrests, may extend only to *mesne* process; but the second is general, and relates to any sort of custody. But the court held the warrant of attorney to be well given, for the defendant had a benefit by it in gaining time, and the second must be construed *being in custody as aforesaid*, the only intent being, to make it necessary to have an attorney on the

5 Mod. 144.

(1) *Vide* the rule *ante* 902. *v. Sharland*, 1 *Term Rep.* *Fell v. Riley*, *Cowp.* 281. *Birch* S. P.

of the defendant, whereas under the former rule, an attorney for 5 Mod. 144.
the plaintiff (who was not likely to advise the defendant for the
best) was sufficient.

Vaughan *vers.* Buller. In Middlesex.

[1246]

IN an action upon a promissory note by the indorsee against If indorser pays
an indorser, it was proved that the defendant had paid part part of a note,
of the money. And Chief Justice Lee held that sufficient, demand on the
to dispense with the proving a demand upon the maker of drawer is unne-
the note. cessary.

Hubbard *vers.* Sir Henry Penrice.

TO a *mandamus* to swear the plaintiff churchwarden of Of common right
Heston in Middlesex; the defendant returned, that he was the electing
not duly elected. And in the course of the trial the question church-wardens
was, where the common right of chusing churchwardens rests? is in the parson
The plaintiff insisted, it was in the parishioners at large as to and parishioners.
both, and would therefore have left it upon the defendant to
show a custom, or right in the parson, to name one; and cited
Carth. 118. *Noy.* 139. for that purpose. The defendant on
the contrary insisted, that of common right it was in the parson
and parishioners (1), and therefore it lay upon the plaintiff to
prove a custom in the parishioners to chuse both; and cited *Cro.*
Car. 532. *Cro. Car.* 551. *Noy.* 31. 1 *Vent.* 267. And of
his opinion was the Chief Justice, and that though there are
some *dictums* to the contrary, yet they had never been regarded.
The plaintiff therefore went on to prove a custom to chuse both
the parishioners, but failed in it; it appearing, that though
the parson had generally left it to the parishioners, yet he had
sometimes interfered.

The Chief Justice likewise held, that a curate stood in the A curate may
place of the parson for the purpose of nominating one church- nominate a
warden; and cited 2 *Vent.* 41. that a curate may make a pre- church-warden.

(1) *Stutter v. Fresson*, ante 52. S. P. acc. Vide 3 *Com. Dig.* *Esgliff*,
1. 653.

Dominus Rex *vers.* Margaret Cooper.

None but a bar-
retor or scold can
be indicted by
general words.

SHE was convicted on an indictment for being a common and turbulent brawler, and sower of discord amongst her quiet and honest neighbours, so that she hath stirred, moved, and incited, divers strifes, controversies, quarrels and disputes, amongst His Majesty's liege people, *contra pacem*, &c. (1)

[1247]

It was moved in arrest of judgment, that the charge was too general, and did not amount to being either a barretor or common scold, which are the only instances in which a general charge will be sufficient. 1 *Sid.* 280. 6 *Mod.* 311. and 2 *Ro. Abr.* 79. 2 *Mod. Cases* 52. *Hawk.* 198, 226. and *Rex v. Taylor*, *Mich.* 3 *Geo.* 2. *ante* 849. were cited for that purpose.

Indictment against a scold should be laid *ad commune nocumentum*.

It was likewise objected, that if the words did amount to a description of a scold, yet it should be laid to be *ad commune nocumentum* of her neighbours, for every degree of scolding is indictable.

And the court was of opinion (*absente C. J.*) that the judgment ought to be arrested on both exceptions, for none of the words here used are the technical words, and it must be laid to be to the common nuisance.

(1) *Rex v. Taylor*, *ante* 849. 2 *Hawk. P. C. cb.* 25. *sect.* 322.

Fitzgerald *vers.* Plunket.

No judgment can be entered but on a warrant agreeable to the rules, though executed abroad.

THE court set aside a judgment entered up on a warrant by an attorney given in *Ireland* by the defendant whilst in custody on *mesne* process at the suit of the plaintiff, because no attorney was present at the giving it, according to the rule of 4 *Geo.* 2. and said that was an universal rule, and this plaintiff, if he would make use of this court, must conform to its rules; comparing it to the case of stamping foreign deeds before they be read here (1).

(1) *Vide ante* 902.

William King *vers.* The Inhabitants of the Hundred of Bishop's Sutton in Hants.

BY 9 Geo. 1. c. 22. the hundred is made liable for damages sustained by the wilful burning of barns, and it requires the party injured to give notice within two days, and within four days after to give in an examination upon oath, whether he knows the person or persons that committed such fact, or any of them: and if he confesses he knows them, then he is to be bound by recognizance to prosecute.

"That he has good reasons to suspect the fact was done by A. and B." is insufficient affidavit in an action against the hundred under 9 Geo. 1. c. 22.

In an action upon this statute, the oath proved was, that he had good reasons to suspect the fact was done by Robert Gibbs and William Langford, both of such a parish. And a doubt arising at the assizes, whether this was sufficient or not, a case was made and twice argued at the bar.

And upon the second argument the court were of opinion, [1248] that the examination did not maintain the action. The oath required is a condition precedent, and for the sake of the hundred, and to prevent screening the offenders. There is a great deal of difference between *suspecting* and *knowing*: a man who knows the offender may purposely stop at the word *suspect*, to avoid being bound to prosecute: and though it would be equivocating, yet it would hardly be a perjury assignable; it being only a suppression of part of the truth. He should have said, *I suspect them to be the men, but I do not know it*. It will be dangerous to let them go out of the words of the act; and therefore the defendants must have the *posse*, and the plaintiff pay the costs of a nonsuit.

Fletcher *vers.* Sandys. At Guildhall.

A Banker's note for 500*l.* was paid to the plaintiff after dinner, who sent it the next morning at nine, when the banker had stopped payment: and it was ruled, that there was no breach in the plaintiff, so as to fix the loss on him; and that in these cases there must be a reasonable time allowed, consistent with the nature of circulating paper credit.

Within what time a banker's note must be demanded. Ante 1175. and cas note.

Dick *vers.* Barrell. At Guildhall.

Policy.
Vide 19 Geo. 2.
c. 37.
Park on Mar.
Jasur. 290.

THE plaintiff insured interest or no interest on any ship he should come in from *Virginia* to *London*, beginning the adventure on his embarking on board such ship; the money to be paid, though his person should escape, or the ship be re-taken.

He embarked on the *Speedwell*, but she springing a leak at sea, he went on board the *Friendship*, and arrived safe at *London*; but the *Speedwell* was taken after he left her. And now in an action against the under-writer he was held liable, for the insurance is on the ship the plaintiff set out in; and had that got safe home, and the other been lost, the plaintiff could not have recovered upon the foot of having removed his person into that ship in the middle of the voyage.

[1249]

Barjeau *vers.* Walmsley.

A parol loan of
money to play
with is not void.

THE plaintiff and defendant gamed together at tossing up for five guineas a time. And the plaintiff having won all the defendant's ready money, lent him ten guineas at a time, and won it, till the defendant had borrowed one hundred and twenty guineas.

In an action for money lent, it was insisted for the defendant, that by the statute 9 *Ann. c. 16.* the plaintiff could maintain no action: for by that act "all notes, bills, bonds, judgments, mortgages, or other securities, or conveyances, given, granted, drawn, entered into, or executed, for money knowingly lent, and advanced to game with, are made void." And the borrowing on an agreement to pay, is a security.

But the Chief Justice held this was not a case within the act, for there is not the word *contract*, as in the statute of usury, and the word *securities*, as it stands in this act, must mean lasting liens upon the estate. The Parliament might think there would be no great harm in a parol contract, where the credit was not like to run very high; and therefore confined the act to written securities. Wherefore the plaintiff obtained a verdict for 126*l.* (1)

(1) *Rolinson v. Bland*, 2 *Burr.* 1077. 1 *Black. Rep.* 231. *B. N. P.* 274. S. C. S. P.

Foster *vers.* Wilmer.

THE insurance was from *Carolina* to *Lisbon* and at and from thence to *Bristol*: it appeared, the captain had taken in salt, which he was to deliver at *Falmouth*, before he went to *Bristol*; but the ship was taken in the direct road to both, and before she came to the point where she would turn off to *Falmouth*. And it was held, the insurer was liable; for it is but an intention to deviate, and that was held not sufficient to discharge the under-writer. In the case of *Carter v. The Royal Exchange Assurance Company*, where the insurance was from *Honduras* to *London*, and a consignment to *Amsterdam*: a loss happened before she came to the dividing point between the two voyages, which the insurer was held to pay for (1).)

An intention to deviate does not discharge the under-writer.

(1) This is recognized as law in *Thelusson v. Ferguson*, *Doug.* 364. *Wooldridge v. Boydell*, *Doug.* 116. But the court have in these cases taken the nice distinction, "that if the ship insured for one voyage fails with the intention of performing one totally different, though she be taken before the dividing point of the two voyages, the policy is discharged, because there was in truth no inception of the voyage which the under-writer meant to insure. See also *Way v. Modigliani*, 2 *Term Rep.* 30.

Dean *vers.* Dicker.

[1250]

THIS was an insurance on goods by the *Dursley* galley, interest or no interest, at and from *Jamaica* to *Bristol*. In her passage she was taken by a *Spanish* privateer, and carried into port will not avail the insurer (1). *Hewitt v. Flexney*. *Like case upon a ransom*.

On a policy interest or no interest a recapture after being in an enemy's

(1) See the several cases upon this subject collected in Mr. *Parker's Treatise on Marine Insurance*, p. 73 to 78. But the 19 Geo. 2. c. 37. enacts, that insurances made on ships or goods, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the insurer, shall be null and void. Sect. 2. contains an exception in favour of private ships of war fitted out solely to cruise against the King's enemies, and sect. 3. merchandizes, &c. from any port or place in *Europe* or *America*, in the possession of *Spain* or *Portugal*. But this act does not extend to insurances of foreign property and on foreign ships. *Thellusson v. Fletcher*, *Doug.* 315.

U u 2

Meres,

Mores, a port in *Spain*, kept eight days, and then cut out by an *English* ship. And the plaintiff insisting, that this, though on goods, was to be considered as a wager on the bottom of the ship, brought his action as upon a total loss. The defendant insisted, that by the statutes of 13 Geo. 2. c. 4. and 17 Geo. 2. c. 34. this ship is to be restored to the owners upon paying salvage, and consequently this is only an average loss; and the plaintiff can only recover upon a total one. But the Chief Justice held, that in this case the plaintiff ought to recover; for his is a wager upon a total loss in the voyage, and here has happened one; for the being carried into port and detained eight days makes one. And where the policy is interest or no interest, the provisions of the acts in the case of valued policies cannot take place. The act does not declare the property is not gone by such a capture, but only provides for restoring the ship to whom it *did* and shall be proved to have belonged. He said it might be otherwise, where the recapture was before the ship was carried *intra presidia*, or in the case of goods actually on board, and upon a valued policy.

Victorin *vers.* Cleeve.

What is departing with convoy.
Vice Park 348.

THE plaintiff insured on goods in the *John and Jane* from *Gottenburgh* to *London*, with a warranty to depart with convoy from *Fleckery*. In *July* 1744, the ship sailed from *Gottenburgh* to *Fleckery*, and there she waited for convoy two months; on 21 *September* at nine in the morning three men of war who had one hundred merchant ships in convoy, stood off *Fleckery*, and made a signal for the ships there to come out, and likewise sent in a yaul to order them out. There were fourteen ships waiting, and the *John and Jane* got out by twelve o'clock and one of the first; the convoy having sailed gently on, and being two leagues a head. It was a hard gale, and by six in the afternoon the ship came up with the fleet, but could not get either of the men of war for sailing orders, on account of the gale of wind. It was stormy all night, and at day break the ship in question was in the midst of the fleet, but the weather was so bad, that no boat could be sent for sailing orders. A *French* privateer had sailed amongst them all night, and the 22d being foggy, attacked the *John and Jane* about two, who kept a running fight till dark, which was renewed the next morning when she was taken.

[1251]

For the defendant it was insisted, that this ship was never under convoy, nor is ever considered so till they have received sailing orders; and if the weather would not permit the captain

to get them, he should have gone back. But the Chief Justice and jury were both of opinion, that as the captain had done every thing in his power, it was a departing with convoy: and these agreements are never confined to the precise words; as in the case of departing with convoy from *London*, when the place of rendezvous is *Spithead*; a loss in going thither is within the policy. So the plaintiff recovered.

Furstenau v. Marsh, at Guildhall, post. term Mich. 20 Geo. 2. a like case.

Tonge vers. Watts.

THE plaintiff insured on ship and freight at and from *Ja-maica* to *Bristol*. A cargo was ready to be put on board; but the ship being careening, in order for the voyage, a sudden tempest arose, and she and many others were lost. The rigging and parts of her were recovered and sold; and the defendant paid into court as much as upon an average he was liable to for the loss of the ship: but the plaintiff insisted to be allowed 600*l.* for the freight the ship would have earned in the voyage, if the accident had not happened. But as the goods were not actually on board, so as to make the plaintiff's right to freight commence; the Chief Justice held, he could not be allowed it, and he was called (1).

The freight a ship would earn is no part of the damages unless the goods are on board.

(1) But in the instance of a the insured was intitled to recover the whole. *Montgomery v. Eggington*, 3 Term Rep. 362. *Vide Park*. 36.

Parish vers. Crawford.

THE defendant was sole owner of a ship, which he let to one *Fletcher* for a voyage at a certain sum, and *Fletcher* was to have the benefit of carrying goods. The plaintiff sent a quantity of moidores, and had bills of lading signed by the captain; and many of the moidores not being delivered according to the consignment, an action was brought against the defendant the owner of the ship, to make him liable as far as the ship and freight was worth, according to 7 Geo. 2. c. 15.

The owner and not the freighter is liable for a loss of gold sent by the ship.

For the defendant it was insisted, that though the ship was his property, yet he was not so owner as to be liable to the plaintiff:

plaintiff: and that *Fletcher* is for this purpose the owner. But it appearing the defendant had covenanted for the condition of the ship, and the behaviour of the master; the Chief Justice held, he was liable to the plaintiff, and the freight he had in general from *Fletcher* was sufficient, though the identical freight for the gold belonged to the other, and *Fletcher* had only the use of the ship, but no ownership (1). See *Abbott on Shipping Port.* 1. ch. 1. Sect. 16. p. 23

(1) *Vide Boucher v. Lawson*, c. 15. and see *Rich v. Coe & al'* *Cas. temp. Hardw.* 85. 195. be- *Cowp.* 636.
fore the passing of 7 Geo. 2.

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Easter Term

19 Georgii 2 Regis. In B. R.

Sir William Lee, Knt. Chief Justice.

Sir Martin Wright, Knt.

Sir Thomas Denison, Knt.

Sir Michael Foster, Knt.

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Justices.

Sir Dudley Ryder, Knt. Attorney General.

The Hon. William Murray, Solicitor General.

Holdfast, on the Demise of Anstey, *vers.* Dowling.

EJECTMENT for lands in *Cambridgeshire* on the demise of *Christopher Anstey D. D.* and *Mary* his wife. And upon a trial at bar the jury found this special verdict.

One of the subscribers to the attestation of a will had an interest under it, and held not to be a credible witness within the statute.
1 Black. 2. S. C. in Cam. Scacc.

That *James Thompson, Esq.* being seised in fee of the premises in question, and of sound mind, signed, sealed and published a paper writing, purporting to be his last will, dated 10 February 1742, and which is found *in hac verba*: by this he declares, that he devises to the defendant the lands in question for life, remainder to his first and every other son and sons in tail male, remainder to his daughters as tenants in common, with a reversion in fee to the right heirs of the devisor: then he charges all his real and personal estate with particular annuities and legacies, and particularly an annuity of 20 l. *per annum* to *Elizabeth* the wife of *John Hailes* for her life and to her separate use; and he also gives a legacy of 10 l. each to *John Hailes* and his wife in mourning. That to this will there are three persons who sub-

scribe their names as witnesses, whereof *John Hailes* is one: and that in their presence, and of no body else, he signed, sealed, and published the paper writing as and for his last will; and they three attested the same in his presence, and are all three living. They find the identity of *John Hailes* the legatee and subscriber, and that *Elizabeth* his wife is still living. That the deviser died 28 May 1743, without issue, and seised as aforesaid, and that Mrs. *Anstey* (one of the lessors) is his aunt and heir at law. They find that before and at the time of the trial the defendant made a tender to *John Hailes* of 20 L. for his and his wife's legacies, which he refused to accept, and that those legacies are not discharged. Then they find the entry and demise by the lessors, &c. *sed utrum, &c.*

This cause was three times argued at the bar, and this term the Chief Justice delivered the resolution of the court,

The question upon this special verdict is, whether in the light *Hailes* now stands, he is to be considered as a credible witness within the intent of the statute of frauds? And we are all of opinion he is not.

The right to devise in this case is not a common law right, it being inconsistent with the notion of a feudal tenure, *Wright's Tenures* 174. but it depends upon powers given by statutes, which must all be considered together, as creating one general parliamentary rule: the particulars of which are, that it must be in writing, signed, and an attestation of three credible witnesses in the presence of the deviser. These were checks introduced to prevent men from being imposed upon; and certainly meant, that the witnesses (who are required to be credible) should not be such as claim a benefit by the will. Though a will may be read, on proof of all the circumstances by one witness: yet that is upon a supposition, there are two others, who could be allowed to give the same testimony.

If the tender would be equal to the payment of the two money legacies, (as it is not) (1) yet the annuity charged upon the estate devised would still subsist; and though it is charged both upon real and personal estate, and the personal (which is not found to be sufficient) would be the first fund, yet it is for *Hailes's* advantage to enlarge the fund by taking in the real estate; and we must at law consider the husband as benefited by the annuity, though given to her separate use; for it is his money.

(1) *Vide Wyndham v. Chetwynd*, 1 Burr. 423. 424. contra.

Carth. 35.
Flow. 18.
Mod. 262.
C. mb. 174.

ney the moment it is paid into her hands, or if not, it eases him in point of maintenance.

It was objected, that nothing vests till the death of the deviser, and therefore at the time of the attestation he had no interest. But the answer is, that he was then under the temptation to commit a fraud, and that is what the Parliament intended to guard against.

[1255]

Another way by which it was attempted to be supported is, that it may be void as to the annuity, but good as to the devise to the defendant; which is grounded upon an expression in *Cartwright's* report of the case of *Hilliard v. Jennings* 514 (a). that the will was void *quoad the devise of lands to the plaintiff*. But whoever reads that will from the record will see, that there were no other lands devised, and therefore it is equal to saying it is void as to any passing of lands; and it was proper to confine the invalidity of it to lands, because as to personal estate it was certainly a good will.

(4) *Com. Rep.*
91. 1 *Freem.*
510. 1 *Ld.*
Raym. 505. *Ca.*
B. R. T. W. 3.
276. *S. C.*

Consider what a door this would open to fraud: a man has four estates, and is beset by four, who fraudulently procure a will, whereby each has a separate estate devised to him. If one is allowed to be a witness for the other three, they thereby establish it for the whole. In 1 *Ld. Raym.* 730. it is held, that there must be an ability as to the whole will, and not as to a particular legacy. In the case of a will consisting of several sheets of paper, as 3 *Mod.* 263. the party benefited in one sheet cannot be set up to prove every other sheet.

It was agreed, this man could not be examined; how then is that credible witness that the statute requires?

The true time for his credibility is, the time of attestation; otherwise a subsequent infamy, which the testator knows nothing of, would avoid his will.

And as to what is said in *Swinb.* 296. it relates only to wills of personal estate, and cannot affect the construction of the statute.

The *Digest*, lib. 28. tit. 1. l. 22. *De testibus, subscriptione, et* *testamentis*, is express: *Conditionem testium tunc inspicere debemus, cum testamentum, non mortis tempore*, and so is the *Code*, lib. 6. tit. 23. l. 1.

We therefore hold this not to be a good attestation of a will *See 23 Geo. 2. c. 6.*
lands; and then the title of Mrs. *Anfley* the lessor of the
plaintiff

plaintiff as heir at law is not defeated by what is set up as a will : and consequently the plaintiff must have judgment (1).

(1) Under what circumstances a subscribing witness shall be deemed a "credible" within the meaning of 25 Geo. 2. c. 6. see *Windham v. Chetwynd*, 1 Burr. 414. 1 Black. 95. Bull. L. N. P. 265. S. C. Lord Ailsbury's case, cited 1 Burr. 427. *Baugh v. Holloway*, 1 P. Wms. 557. *Price v. Lloyd*, 2 Vez. 374. Decem. *Kindson v. Kearsey*, 4 Burr. Eccl. Law, 86. where the authority of this case is considerably shaken.

[1256]

Between the Parishes of Osgathorpe and Diseworth.

What orders are final between two parishes.
Burr. Sett. Ca. 261. S. C.

A Person was removed by order of two justices of the peace from *Diseworth* to *Osgathorpe*, which order on appeal was discharged. He was by a second order sent from *Diseworth* to *Osgathorpe* as a certificate man; and upon an appeal it was stated, that the first removal was *before he became chargeable*, and the second *after he became so*; and the sessions were of opinion that the first determination was not final between the parishes and therefore confirmed the second order of removal.

And it was moved to quash these two last orders, on the authority of *Salk.* 492, 524. which says, a reversal is final between the parties. *Sed per curiam*, So it would be, if the special matter did not appear; a certificated person cannot be sent back until he is actually a charge; a removal before is premature. The consequence of which only is, that he must be suffered to remain till he does become chargeable, but not to make premature removal final for ever. The last orders must be confirmed.

Dominus Rex *vers.* James et al'.

Sessions has no jurisdiction as to new offences without express words. *Salk.* 680. 4 Mod. 51. 4 Mod. 379. 5 Mod. 149. C. p. Eliz. 87. 9 Co. 118. b. Vid. 4 Com. Dig.

INDICTMENT at *Cumberland* sessions for fastening across the river *Eden*, contrary to the statute 2 Hen. 6. c. 15. There were many exceptions taken to it, but the objection for which it was quashed, was, that the statute gives a penalty of 100 s. but gives no jurisdiction to the sessions, and they cannot have it without express words, in the case of a new created offence.

(B. 1.) (B. 3.) tit. *Justicia*.

Trinity Term

* 19 Georgii 2 Regis. In B. R.

* 19 & 20. See
Burr. Settl. Ca.
264. pl. 10.
1 Will. 134.

Sir William Lee, *Knt. Chief Justice.*

Sir Martin Wright, *Knt.*

Sir Thomas Denison, *Knt.*

Sir Michael Foster, *Knt.*

} *Justices.*

Sir Dudley Ryder, *Knt. Attorney General.*

The Hon. William Murray, Solicitor General.

Lloyd *vers.* Vaughan.

UPON error to reverse a common recovery suffered at the grand sessions in *Wales*, 5 *Ann.* the error assigned was, that *Jane Lloyd*, the tenant in tail who was vouched as a *feme sole*, was then under coverture, and died without issue in 1739. Wherefore the plaintiff, who was the reverser, brings the writ of error. The defendant in error pleads a bar by the statute 10 *W. 3. c. 14.* as not being a writ of error brought within twenty years after suffering the recovery. To this it was replied, that his title did not accrue till 1739, the time of the death of *Jane*. And to this there was a demurrer, and joinder in demurrer.

Reverser
cannot have error after 20 years, though his title did not accrue till after.

After several arguments at bar, both upon the point of the error, and the statute of limitations; it was this term determined upon the latter point, the court saying, they had no occasion to

go into the other question, being of opinion the writ of error did not lie.

[1258]

And what they grounded this opinion upon was, that the statute was made to quiet possessions, and to fix one certain period, beyond which fines and recoveries should not be impeached: the words are express, *Twenty years after the recovery suffered*, and it has not the words that are in the statute of fines, *after the title accrued*. And though there is a proviso for persons under disabilities within the twenty years, yet that can only introduce the disabled person, and not one who never was under any disability. The *terminus a quo* is the suffering the recovery, and if we exceed it, there will be no end; a reversioner after an estate-tail that subsists an hundred years, might at this rate reverse a recovery; whereas these reversioners were never the object of the legislature's care. It is enough that he has a chance of the reversion's falling within twenty years, and then he may have error. They said they must keep to the words, as in 1 Lev. 31. where the courts not being open, was held no answer to the statute of limitations, as not being one of the exceptions in it. Therefore they gave judgment that the plaintiff should take nothing by his writ of error.

The courts not being open is no bar to the statute of limitations.

Fortescue Aland vers. Mason, ante 861.

Where on error from Ireland on a collateral point the judgment is affirmed, the record must be sent back, and B. R. in England cannot proceed upon it. 1 Barn. B. R. 5. 100, 176, 231, 288. Fi 25. 114. 2 Ld. Raym. 1433. S. C.

THE defendant in error being come of age, the plaintiff in error took out a *scire facias ad audiendum errores* in B. R. in England. But it was ruled, that this court could not proceed: for though if they had reversed the judgment for the parcel to demur, they might then do as the court in Ireland should have done, by going on to examine the errors; yet having affirmed their proceedings, the record must be remitted to the King's Bench in Ireland, for them to warn in the heir; else it would be judging *per saltum* of the errors, without the intervention of that court. So the record was removed by an award *nunc pro tunc*.

Moore vers. Fernyhouth.

Venue not to be changed where cause of action arises in a Welsh county. 1 Will. 138. S. C. 1 Will. 221. Ante 807. Post 1270.

THE venue was laid in London, and it was moved to change it into Salop, upon an affidavit that the cause of action arose in Denbighshire, and Salop was the next adjacent English county. But the court said it could not be done without consent. And Mr. Justice Denison said it was denied to him *Mab* 8 Geo. 2. Lloyd v. Williams. Ld. Raym. 1418.

Dominus Rex *vers.* The Churchwardens of Weobly.

THE court refused to grant a *mandamus*, directing to insert particular persons in the poor's rate, upon affidavits of their sufficiency, and being left out to prevent their having votes for Parliament-men: for that the remedy was by appeal, and this court never went further, than to oblige the making a rate, without meddling with the question, who is to be put in or left out; of which the parish officers are the proper judges subject to an appeal (1).

No *mandamus* to insert particular persons in poor's rate. 1 Bott by Const, 81. pl. 112, 224. pl. 230. S.C.

(1) *Rex v. Overseers of Barnbury*, 4 Burr. 2290. That a *mandamus* does not lie to make an equal rate. *Rex v. Guardians of the Poor of Canterbury*, 4 Burr. 2290. *Rex v. Churchwardens of Freshford*, And. 24. *Rex v. Guardians of the Poor of Canterbury*, 4 Burr. 2290.

Markham *vers.* *Middleton*.

THE defendant owed the plaintiff 333*l.* for an apothecary's bill, and suffered judgment to go by default; and the plaintiff's attorney, on executing the inquiry, produced the foreman, who had told him he could prove the bill; but when the jury was sworn, he declined giving any evidence. Upon which the sheriff was desired to adjourn, which he thought he could not do, and the jury thereupon found one penny damages only.

Writ of inquiry set aside for smallness of damages.

This was moved to be set aside, upon the head of surprize and mistake of the sheriff; upon the authority of *Woodford v. Eades*, (ante 425.) *Parry v. Niblett*, (Pasch. 10 Geo. 1.) and *Coleman v. Marwby*, (ante 853.)

The court thought it hard the plaintiff should be paid so large a debt with one penny, as he would be if this verdict stood; or that his case should be worse for the defendant's letting judgment go by default: for had he pleaded, the plaintiff could have suffered a nonsuit. And therefore they set aside this, and ordered a new writ of inquiry, on payment of costs (1).

(1) Vide also *Hall v. Stone*, cited. *Hayward v. Newton*, ante 515. *Chambers v. Robinson*, 940. and the note. ante 692. and the cases there

Michaelmas Term

20. Georgii 2 Regis. In B. R.

Sir William Lee, Knt. Chief Justice.

Sir Martin Wright, Knt.

Sir Thomas Denison, Knt.

Sir Michael Foster, Knt.

} *Justices.*

Sir Dudley Ryder, Knt. Attorney General.

The Hon. William Murray, Solicitor General

Rawlinson

* *Robinson* *vers.* Stone.

An administrator or executor may indorse bills or notes, within the custom of merchants. 3 Will. 1. S. C. more at large 2 Burr. 1225. S. C. Barnes 164. S. C. in C. B.

ON error from C. B. it appeared to be an action by indorsee of a promissory note, indorsed by a woman as administratrix: a demurrer to the declaration, and judgment for the plaintiff.

It was objected, that an administratrix was not within the custom of merchants in the case of bills of exchange. And the statute 3 Ann. c. 9. makes notes assignable only in the same manner as bills of exchange are. *Sed per curiam*, We cannot

* *Rawlinson* seems the right name, see *Burrow, Wilson*, and *Barnes* n. to 2d edit.

say this upon a demurrer. It should have been pleaded, or found, not to be within the custom: and it is every day's practice, to have indorsements made by executors.

It was then objected, that there was no *profert* of letters of administration. *Sed per curiam*, That is only required, where the action is by an administrator, but not where a third person only derives *through* one. The judgment was affirmed. Profert, where necessary. [1261]

Case of the Overseers of Weobly in Herefordshire.

THERE were two sets of overseers appointed, and both quashed; one because the persons appointed were described only as *principal inhabitants*, instead of pursuing the words of the statute 43 Eliz. c. 2. which are *substantial householders*: and the other because it only called them *substantial householders*, without adding *there, or in the parish*; and this too was not the body of the appointment (as it ought to be) but only in the direction at the foot of it (1).

It is not enough that overseers are styled principal inhabitants

(1) *Rex v. Great Marlow, Foley v. Murrel*, 1 *Seff. Ca.* 233. pl. 189. S. P. But *Rex v. Morris*, 4 *Term Rep.* 550. *Nol. Rep.* 31. *Sherringbrook*, 2 *Ld. Raym.* seems *contra*.
94. 2 *Seff. Ca.* 52. pl. 54. *Rex*

Lowfield *vers.* Stoneham, Executrix. At Guildhall.

UPON *plene administravit* pleaded, the question was, whether 1000 *l.* received by the defendant was due to her in her own right, or as executrix of her husband, and consequently assets. And it arose upon the following devise, "I give to my loving brother John Stoneham 1000 *l.* and in case of his death, to his wife Susanna," (who was the defendant). It appeared that John Stoneham survived the testator; and therefore the plaintiff insisted, this legacy (which the defendant admitted she had received) vested absolutely in him, and was assets in her hands.

Parol evidence not admitted to contradict the words of a will.

On the part of the defendant it was offered to give in evidence, that the testator *in extremis* declared, he meant only to give his brother the interest of the 1000 *l.* and that the defendant should have the principal in case she survived him.

This

(a) *Fowles*. 240.
4 Bro. P. C.
179.

This parol evidence was opposed by the plaintiff's counsel, as being contradictory to the plain words of the will. And the Chief Justice said, it could not be allowed; and that in the case of *Selwin v. Brown* (a), the House of Lords had refused it even where it was to support the legal interpretation of the will and Lord *Hardwicke* about two years ago held it in the same manner in the case of the Earl of *Inchiquin v. Obrian* (1).

(1) *Vide Strode v. Lady Falkland*, 2 Vern. 621. *Bertie v. Falkland*, 1 Salk. 231. but reversed in *Dom. Proc. Ballis and Church v. Attorney General*, 2 Atk. 239. *Bull. L. N. P.* 298. *S. C. Cole v. Rawlinson*, Salk. 234. *Chamberlayne v. Chamberlayne*, 2 Freem. 51. *Whittons v. Russell*, 1 Atk. 448. *Ulrick v. Litchfield*, 2 Atk. 373. *Castledon v. Turner*, 3 Atk. 257. *Hampshire v. Pierce*, 2 Vesi. 217. *Maybank v. Brook*, 1 Bro. Chan. Rep. 84. See more 8 Vin. Abr. 189. But parol evidence has been admitted in favour of executors to rebut the equity of the next of kin to the undisposed surplus of personal estate, *Countess of Gainsborough v. Earl of Gainsborough*, 2 Vern. 258. *Littlebury v. Buckley*, cited 2 Vern. 677. *Batchelor v. Searl*, *Ib.* 736. *Crompton v. North*, cited *Ib.* 253. *Wingfield v. Alkinson*, *Ib.* 673. *Petit v. Smith*, 1 P. Wms. 9. *Lamplugh v. Lamplugh*, *Ib.* 112. *Lady Granville v. Dutcheffs of Beaufort*, *Ib.* 115. 2 Vern. 648. *S. C. Duke of Rutland v. Dutcheffs of Rutland*, 2 P. Wms. 109. *Heron*

v. Newton, cited *Ib.* 160. 9 Mod. 11. *Wheeler v. Sheers*, *Moit.* 292. *Brasbridge v. Woodroffe*, 2 Atk. 68. *Hatton v. Hatton*, 2 Eq. Ca. Abr. 443. pl. 56. *Lake v. Lake*, 1 Wils. 313. *Amb.* 126. *S. C. B.* see the opinion of Lord *Hardwicke* in *Blinkborne v. Feaf*, *Vex.* 28. *Vide also Mallabar v. Mallabar*, *Ca. temp. Talb.* 7. *Gascoigne v. Thawing*, 1 Vern. 36. *Walker v. Walker*, 2 Atk. 9. *Brady v. Cubitt*, *Doug.* 31. *Ca. v. Boyd*, 2 Bro. Chan. Rep. 52. *Clinton v. Hooper*, 3 Bro. Chan. Rep. 201. It seems also to have been admitted to support the resulting trust for the next of kin, *Fane v. Fane*, 1 Vern. 39. *Bispe of Cloyne v. Young*, 2 Vex. 95. *Rachfield v. Careless*, 2 P. Wms. 157. And that it is equally admissible against the executor for him, *vide* 2 Bro. Chan. Rep. 527. As to cases in which parol evidence has been held admissible or not, in explanation of other written instruments. *vide Wils.* *Poulter*, ante 794.

[1262]

Merryman *vers.* Carpenter.

Practice.

THE writ was returnable in *Easter* term, and a bail-bond taken; the plaintiff never stirred till 24th *October*, and then took an assignment of the bail-bond: and special bail being put in the next day, the question was, whether on staying proceedings the bail-bond was to stand as a security. The defendant insisted, it should not, because the plaintiff did not deliver a declaration *de bene esse*, as he might have done, and thereby quickened the defendant. But the court held, he was

bound to do so; and the defendant was in the first fault, whereby the plaintiff had lost a trial. So the defendant was forced to consent, to let the bail-bond stand as a security (1). *Ante* 814.

(1) *Vide Carmichael v. Chandler*, T. 24 Geo. 3. *Imp. Prac. K. Reg.* 71. *Sparrow v. Naylor*, in B. 150. *Ed.* 1791. *Tidd's Prac. C. B. contra*, 2 *Black.* 876.

White *vers.* Haugh.

THE sheriff had the defendant in execution on a *capias ad satisfaciendum*; and the plaintiff delivered him a *habeas corpus*, in order to remove him into the *King's Bench* prison: the sheriff upon this insisted to be paid his poundage on the execution, before he parted with the body of the defendant; and would have distinguished this from the cases in *Salk.* 330, 331, 332. inasmuch as he had here actually executed the process, and those cases go only against his insisting to be paid beforehand. And that there is nothing in the statutes 29 *Eliz. c. 4.* or 3 *Geo. 1. c. 15. § 17.* against it: and offered on payment of his poundage, to bring up the body. But the court said, they could not be making bargains with people to obey their process, which they would force an obedience to, and leave the sheriff to his action of debt for the fees, which was his legal remedy. It went off at last, upon the sheriff's submitting to carry him to a Judge's chamber. And *Foster* Justice said, If he was brought to him, he would not turn him over, till the poundage was paid (1).

Sheriff cannot refuse to obey process for non-payment of fees.

(1) *Vide Anon. ante* 308. *Hopman v. Barber*, *ante* 814. *Tidd's Prac. C. B.* 176.

Hilary Term

20 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir Martin Wright, *Knt.*

Sir Thomas Denison, *Knt.*

Sir Michael Foster, *Knt.*

} *Justices.*

Sir Dudley Ryder, *Knt. Attorney General.*

The Hon. William Murray, *Solicitor General.*

Dominus Rex *vers.* Sir Robert Cann.

Orders of sewers.
Practice there-
upon.

SOME orders of sewers having been made upon him, he removed them by *certiorari*. And upon the motion to file, the commissioners offered to try any issue the defendant could take upon them: he refused to come into any issue, and the court inclined to grant a *procedendo* for that reason: but upon further consideration, they thought they could not refuse to hear the objections; but then they would not file the orders first, but debate the objections upon the motion to file, so as to have it in their power to send them back again (1).

(1) *Anonymous*, 11 *W. 3. B. R.* *P. C.* 409. c. 27. f. 34. *S. P.* See *Salk.* 145. *Anon.* 5 *Geo. 2.* 2 vide a note of a case 4 *Ann. B. R.* *Barnard.* *B. R.* 151. 2 *Harwk.* at the end of the case in *Salkeld.*

Dominus Rex *vers.* the Inhabitants of Polstead.

A PPEAL was made to the quarter-sessions in *Suffolk*, held 7 April 1746, against an order of removal. The sessions was adjourned to 9 April at *Woodbridge*, where for want of a sufficient number of justices nothing could be done. The 11th of April a sessions is held at *Ipswich*, and adjourned to the 14th at *Bury*, where the appeal was allowed.

A quarter-sessions once dropped cannot be resumed.

[1264]

It was moved to quash the order of sessions, as made without jurisdiction, the sessions ending for want of an adjournment at *Woodbridge*. And of that opinion was the court, for the words in 2 H. 5. c. 4. and more often if need be, were never considered as giving more than one original sessions in a quarter, but only empowering adjournments. The country must take notice of adjournments, but are not supposed to expect a new sessions till the usual time. The order of sessions was quashed (1).

(1) *Rex v. West Torrington, Burr.* authorities collected 2 Bott by S. C. 293. S. P. Vide also the *Const.* 843, 4, 5.

Dayrell *vers.* Bridge.

ON a motion for a new trial, the *possea* was brought into court; and after the new trial had been denied, the *possea* could not be found. And the court (on debate) ordered a new one to be made out from the record above and the associates notes (1).

New *possea* made out.

Ante 1077. 141—833.

(1) *Stone v. Overton, Barnes* 14. *Keat, Salk.* 47. 1 *Ld. Raym.* 138. *Darby v. Gold,* 2 *Kely.* 106. *Har-* S. C. *Bold's Case, Salk.* 58. 1 *Ld.* *Wry v. James,* 1 *Vent.* 92. *Tufton Raym.* 335. S. C. *v. Apoley, Cro. Car.* 145. *Rex v.*

Smith *vers.* Pelah. At Guildhall.

THE Chief Justice ruled, that if a dog has once bit a man, and the owner having notice thereof keeps the dog, and lets him go about, or lie at his door; an action will lie against him at the suit of a person who is bit, though it happened by such person's treading on the dog's toes, for it was owing to his not hanging the dog on the first notice. And the safety of the King's subjects ought not afterwards to be endangered. The *center* is the *git* of the action (1).

Action for keeping a dog used to bite.

(1) *Buxenden v. Sharp,* 1 *Salk.* the case for negligence, (A. 5.) 295. 161. Vide 1 *Com. Dig.* action on 5 *Com. Dig. Pleader.* (2 P. 2.) 607.

Elton *vers.* Brogden. At Guildhall.

If the sailors force the master to go out of the course of the voyage, it is not a deviation. Park on Mar. Insur. 299. and the cases there collected.

[1265]

THE ship *Mediterranean* went out in the merchants service with a letter of marque, and bound from *Bristol* to *Newfoundland*, insured by the defendant. In her voyage she took a prize, and returned with it to *Bristol*, and received back a proportionable part of the premium. Then another policy was made, and the ship set out, with express orders from the owners, that if they took another prize, they should put some hands on board such prize, and send her to *Bristol*, but the ship in question should proceed with the merchants goods. Another prize was taken in the due course of the voyage, and the captain gave orders to some of the crew to carry the prize to *Bristol*, and designed to go on to *Newfoundland*: but the crew opposed him, and insisted he should go back, though he acquainted them with the orders: upon which he was forced to submit, and in his return his own ship was taken, but the prize got in safe.

What is not barratry. Vide Park on Mar. Insur. 87. and the cases there collected.

And now in an action against the insurers, it was insisted, that this was such a deviation, as discharged them. But the court and jury held, that this was excused by the force upon the master, which he could not resist; and therefore fell within the excuse of necessity, which had always been allowed. The plaintiff's counsel would have made barratry of it; but the Chief Justice thought it did not amount to that, as the ship was not run away with in order to defraud the owners, So the plaintiff had a verdict for the sum insured.

Gordon *vers.* Morley.Campell *vers.* Bordieu.

} At Guildhall,

A ship may go to the general convoy at the hazard of the under-writers. (1)

ON an insurance from *London* to *Gibraltar*, warranted depart with convoy; it appeared there was a convoy appointed for that trade at *Spithead*, and the ship *Ranger* having tried for convoy in the *Downs*, proceeded for *Spithead*, and was taken in her way thither.

(1) *Bond v. Nutt*, Cowp. 601. *Lond. Trin. 1780. Park v. Enderby et al' v. Fletcher*. Sit. in *Mar. Inf.* 309. S. P.

The insurers insisted, that this being the time of a *French* war, the ship should not have ventured through the channel, but have waited in the *Downs* for an occasional convoy. And many merchants and office-keepers were examined to that purpose. But the Chief Justice held, that the ship was to be considered as under the defendants' insurance to a place of general rendezvous, according to the interpretation of the words, *warranted to depart with convoy*. *Salk.* 443, 445. And if the parties meant to vary the insurance from what is commonly understood, they should have particularized her departure with convoy from the *Downs*.

Bond. v. Con-
sales.

The juries were composed of merchants, and in both cases found for the plaintiffs upon the strength of this direction.

Easter Term

20 Georgii 2 Regis. In B. R.

Sir William Lee, Knt. Chief Justice.

Sir Martin Wright, Knt.

Sir Thomas Denison, Knt.

Sir Michael Foster, Knt.

} *Justices.*

Sir Dudley Ryder, Knt. Attorney General.

The Hon. William Murray, Solicitor General.

Thompson vers. Tiller.

Practice.

THE defendant by leave of the court pleaded *non assumpsit*, and the statute of limitations; and delivered it to the plaintiff's attorney, who made up the issue, and delivered it with notice of trial to the defendant's attorney, who paid for it. The plaintiff's attorney finding afterwards, it should have been made up with the clerk of the papers, went and paid him his fees, made up the record, and went to trial. And the court refused to set it aside, though the defendant made no defence. For *per curiam* he was in the first fault, in not leaving the plea in the office.

Baxter, Widow and Executrix, vers. Burfield.

Apprentice is not bound to serve the executor of the master (1). 1 Bott by Const, 523. Pl. 745. S. C.

IN debt on bond, conditioned for *Matthias Anderson's* performance of the covenants in an indenture of apprenticeship whereby he was bound to the plaintiff's testator, who was

(1) *Rex v. Eakring, Burr. S. C. 320. S. P.*

mariner

mariner: the defendant pleaded, that *Anderson* served faithfully to the death of the testator: the plaintiff replied, that since the death of the testator, *Anderson* had absented from her service: to which there was a demurrer. And after argument at bar, the Chief Justice delivered the resolution of the court, viz. That they were all of opinion, the defendant should have judgment; and the executrix could maintain no such action. The binding was to the *man*, to learn *his* art, and serve *him*, without any mention of executors. And as the words are confined, so is the nature of the contract; for it is fiduciary, and the lad is bound from a personal knowledge of the integrity and ability of the master, (*Hob.* 134. *Vaugh.* 182. 3 *Keb.* 519. and 1 *Keb.* 820. 1 *Sid.* 216) and they denied the case in 1 *Lev.* 177. An award (*Hil.* 8 *Ann.* *Horne v. Blake*) that an apprentice should be assigned, was held void; unless there was a custom, or the concurrence of the apprentice. And they held, it was not material, that according to *Gro. Eliz.* 553. the assets were liable on the master's covenant to maintain. Therefore judgment *pro def.* (2).

(2) But see 32 *Geo.* 3. c. 57. which impowers two justices upon application within three months after the master's decease, to order apprentices with whom no more than five pounds has been paid at binding, to serve out the

remainder of their time with the widow, son, daughter, brother, sister, executor, or administrator of such master, they having lived with and been part of his family at the time of his death.

Blackbourn *vers.* Matthias.

THE defendant pleaded the general issue, but forgot to give notice at the same time of a set-off. And upon motion in time, the court gave leave to withdraw the plea, in order to deliver the same plea again with a proper notice to set off. And said it had been done so before. *Strange pro def.*

Practice as to a set-off.

Vide post. 1271, as to bringing money into court on the same reason (1).

(1) *Vide Giddings v. Giddings*, *Merits*, as the statute of limitations. *Cox v. Rolt*, 2 *Wils.* 253. *Taylor v. Joddrell*, 1 *Wils.* 254. See *Thornton qui tam v. Gibson*, 1 *Wils.* 157. Secus if the plea to be pleaded excludes the

Keen, on the Demise of the Earl of Portsmouth et al', *vers.* the Earl of Effingham.

Where a bad deed to make a tenant appears, the court will not presume a good one though to support an old recovery.

ON a trial at bar, wherein the validity of two common recoveries in 1714 and 1721 came in question, it was ruled by the court, that though at such a distance of time proper tenants to the *præcipe* shall be presumed, where no deed appears (1); yet in this case, it appearing that there were deeds inrolled for that purpose, wherein proper parties did not join, and the uses were declared to have been warranted by such deeds; the court could not presume there were any others. And so directed the jury to find against the recoveries, which they did accordingly (2).

(1) *Warren ex dimiss. Webb v. v. Duke of Chandos*, 2 Burr. 1065, *Greenville*, ante 1129. where this case is cited and com-

(2) *Vide Goodtitle ex dem. Bridges* mented upon, *Ibid.* 1073.

[1268]

Anderson *vers.* Baddislade.

Practice.
Ante 1162. and
the note.

ON a writ and declaration of this term, and an eight days rule to plead given, the defendant at the end of the eight days put in a plea in abatement: which the court on my motion set aside, for they only gave that time to plead in chief, and never intended to enlarge the time for a dilatory.

Dominus Rex *vers.* King et al'.

Indictment not
quashable.
Ante 1211.

THE court would not quash an indictment against overseers for not paying over-money to their successors, as quashing was not *ex debito justitiæ*, and this is a growing evil.

Dominus Rex *vers.* George Trevilian, Esq.

Whether in-
dictable for not
taking an ap-
prentice.
8 & 9 W. 3.
c. 30. § 5.

AN indictment for not receiving an apprentice was quashed because it did not appear to be a binding within 43 *Ellis* c. 2. And the court said, that was not barely matter of evidence, but the circumstances must be averred. They would not meddle with the general question, whether an indictment would lie or not.

Trinity Term

21 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir Martin Wright, *Knt.*

Sir Thomas Denison, *Knt.*

Sir Michael Foster, *Knt.*

} *Justices.*

Sir Dudley Ryder, *Knt. Attorney General.*

The Hon. William Murray, *Solicitor General.*

Symonds vers. Parmenter.

IN *assumpsit* by original against two defendants, the plaintiff shewed that he had outlawed one of them; and the other pleaded in bar, that his partner so outlawed was beyond sea at the time of the outlawry. And upon demurrer it was objected, that this could not be pleaded in bar: to which it was answered, that it could not be pleaded in abatement, because the defendant could not give the plaintiff a better writ; and the court would take notice, that it was in the plaintiff's power to prevent its being a bar, by discontinuing.

Assumpsit
against two, and
one outlawed;
the other cannot
plead in bar, that
his partner so
outlawed was
beyond sea.
More full
1 Black. 20.
4 Bro. Par. Ca.
604. S. C.

Sed per curiam, If this matter is ever to be pleaded, there will be an end of suing partners whilst any one is abroad, which is often the case. However it can never be good as a general bar; for though the defendant cannot give the plaintiff a better writ, yet he might demand judgment, (if there was any thing in the merits) whether the court would (as the record now stands) compel him to give any further answer. Therefore they gave judgment for the plaintiff.

Tindale *vers.* Gwynne.

*Venue changed
from London to
Carmarthen.*

Notwithstanding the case of *Moore v. Fernyhouth*, (ante 1258.) I prevailed to have a rule to shew cause, why the venue should not be changed from London to Carmarthen; and it was made absolute on an affidavit of service (1).

(1) *Whadington v. Thelwell*, 4 in C. B. 2 Black. 962. But see *Burr.* 2450. S. P. in B. R. and see also *Pritchard v. Pugh*, Day. 262. and the cases cited ib. [† 73.] But *Watkins v. Hybert* decision. *Freeman v. Gwynn*, S. P. Say. 48. is contra.

Richardson *vers.* Jelly.

Practice.

PER curiam, Where the bail do not apply to stay the proceedings pending error, till their time to surrender is out we will not give them any time for that purpose, but only four days to pay the money in, after the judgment is affirmed (1).

(1) *Vide* the cases cited *Myer v. Arthur*, ante 419.

Collier *vers.* Hague.

Practice.

THE plaintiff on going beyond sea made an affidavit 4th 1744, that the defendant was indebted to him in 277 16s. 6d. for goods sold and delivered. On this affidavit process was taken out 9th May 1747, and marked for bail. But the court ordered the defendant to be discharged on common bail; though he owed so much in 1744, he might not owe it in 1747. And the act requires an oath of a subsisting debt at the time suing out the process.

Allam *vers.* Heber.

*What is affected by
descent.
1 Black. Rep.
22, S. C.*

ON *riens per descent* pleaded, it appeared that the ancestor devised the lands to the heir for payment of debts. And the court held, that notwithstanding they were a charge on the land yet the heir was in by descent; for the tenure is not altered. Cases cited were *Salk.* 242. *Hob.* 30. *Dy.* 124. *Str.* 1.

3 *Leo.* 127. *Mo.* 644. *Cro. Eliz.* 833. 919. 1 *Roll. Ab.* 626. *J. Lutw.* 797. *Cro. Car.* 161. 2 *Mod.* 286. *Ld. Raym.* 728. And the statute of King William only charges other devisees (1).

(1) *Vide ante* 490. *Smith v. Chanc. Rep.* 136. *note*, Lord Hardwicke held, that though lands so devised descended to the heir, yet that they were equitable assets so as to entitle simple contract creditors to a distribution *pari passu*. See also the opinion of Lord Thurlow in *Batson v. Lindegreen*, 2 *Bro. Chanc. Rep.* 94.

Guy et ux' *vers.* Kitchiner et al'.

[1271]

IN assault and battery, the memorandum was generally of Michaelmas term, and the fact on son assault proved, was on a day within the term, viz. 27th of October (1). And a case being made of this, it was held well enough; for the plaintiff needed have given no evidence on this plea, unless to aggravate damages; and the court will not nonsuit him, because it is amendable by a new bill.

(1) This term was further abridged by 24 Geo. 2. c. 48. to commence 3d November.

Hookin *vers.* Quilter.

HERE were three counts in the declaration as executrix, and the fourth was for the use and occupation of the plaintiff's house. Judgment by default in C. B. and reversed on error. For *per curiam*, There being no verdict, we can presume nothing, but that the fourth count is, as it appears, in her own right, which cannot be joined with the others; and the damages intire (1).

Executor cannot add a count in his own right. 1 *Wils.* 171. S. C. more at large.

(1) *Vide Jones v. Wilson*, 11 *dict.* *Bull. L. N. P.* 138. *Lé* 256. *Petrie v. Hannay*, 3 *C. J. contra*, *Denison J. pro.* 1 *Rep.* 659. and that this *Wils.* 172.

Martin vers. Chauntry.

What not a note
within the sta-
tute.
Ante 629.

THE court held on error from *C. B.* that a note to deliver up horses and a wharf, and pay money at a particular day, could not be counted on as a note within the statute; and therefore reversed the judgment (1).

(1) *Bull. L. N. P.* 272.

Remington vers. Stevens.

Statute of limita-
tions replied to a
set-off.

IT was held, that the statute of limitations may be replied to a plea of a set-off (1).

(1) *Bull. L. N. P.* 180. S. P. dence under a notice of set-off and that if it be given in evi- it may be objected to. *ib.*

Tarlton vers. Wraggs.

Practice.

THE court gave leave to withdraw the general issue, in order to bring money into court, and replead it; within the reason of *Blackbourn v. Matthias*, (*ante* 1267.) not delaying the plaintiff (1).

(1) Money may be paid into purpose. *Per Buller J.* in *Griffiths v. Williams*, 1 Term Rep. 711.

[1272]

Howel qui tam vers. James.

Act of grace.

AN information was filed in the crown-office on 8 Geo. 1 c. 19. which in cases of the game gives the penalty between the informer and the poor. And the court held, that the crown having no interest, the defendant could not have the benefit of the act of grace, so as to stay proceedings on payment of costs.

Harrison *vers.* Bearcliffe et ux'.

BOTH were arrested for her debt *dum sola*: and the court Baron and fone. discharged her, and said the husband must lie till he puts in bail for both. 1 *Lev.* 51. 216. and 1 *Vent.* 49. denied to be law (1),

(1) *Roberts v. Andrews et ux.* cases cited in *Pitts v. Miller*, ante 1167. *Black.* 720. S. P. *Et vide* the

Oates *vers.* Shepherd.

THE term in ejectment being near expiring, it was amended, without any consent, from five years to ten years (1). Amendment.

(1) *Vide Doe v. Pilkington*, 4 *Burr.* 2447. where the demise being laid prior to the entry by plaintiff to avoid a fine, it was altered to a time subsequent. But there the statute of limitations would otherwise have barred him in a new ejectment. See also *Roe v. Ellis*, 2 *Black.* 994. *Vicars v. Haydon*, *Cowp.* 841. Where B. R. amended the declaration by enlarging the term after judgment in Ireland had been affirmed there, and the record transmitted thither. But in the more ancient cases the court refused to enlarge the demise even where the plaintiff was delayed in his judgment until its expiration, either by an injunction out of Chancery at the defendant's prayer, or through the time taken by the court in determining upon the difficulties of his case, *Anon. Saik.* 257. *Scraps v. Rhodes*, *Barnes* 8. *Driver v. Scratton*, *Barnes* 17. *Roe v. Doe*, *ex dem. Stephenson*, *ib.* 186. *Kesworth v. Thomas*, *Andr.* 208. *Thrustout v. Gray*, *cas. temp. Hardw.* 165. See also several other cases to the same purport cited in *Doe v. Pilkington*, 4 *Burr.* 2447.

Gimbart *vers.* Pelah, In Middlesex.

THE defendant justified impounding cattle *damage feasant*. And on evidence it appeared he put them into the next pound, though it happened to be in another county. And on *Lev.* 48. the Chief Justice held, it did not make him a trespasser, though it subjected him to the penalty in the statute *2 Philip & Mary, c. 12. Verdict pro def.* Impounding in another county does not make a trespasser. *Glib. Law of Distress*, 4 ed. 76.

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I N D E X

Abatement.

PROCEEDINGS in information of *quo warranto* do not abate by death of the King. Page 782

The King's writ of error in *quare impedit* abates by his death. 843

Prohibition at the suit of husband and wife does not abate by the death of the husband. 1063

Overture of the defendant after action brought cannot abate the plaintiff's suit. 811

Time in abatement must come in within the first four days. 1192

Affidavits are requisite to a plea in abatement in the crown-office. 1161

Time that the original was not returned must be verified by affidavit. 639

Time of privilege without affidavit set aside. 738

Dilatory can not be pleaded after an imparlance. 523, 532

Action for impleading *A.* in the Admiralty court, for a matter at land, and arresting the 32d part of a ship belonging to him, whereby she was detained, &c. Plea in abatement that there were other part owners who are not joined, who were injured, as the whole ship was thereby detained. Judgment of *respond. ouster* for the gift of the action is the suit in the Admiralty. 1045

Matter of record pleaded by way of dilatory, if of another court, must be *sub pede sigilli*. 520

Trader may be sued by his degree, and the writ shall not abate unless he pleads another degree. 556

Time of wrong addition must give another addition of the same kind. 816

One part-owner brings trespass without his companion, it must be pleaded in abatement. Page 820

That there is another obligor bound in the bond, must be pleaded in abatement. 503

Judgment on demurrer upon a plea in abatement must be, *quod respondeat, &c.* 532

See *Wien, Name, Joint and several,*

Accord.

The giving a note for 5*l.* can not be pleaded in satisfaction of an *assumpsit* for more money. 426

A seoffment is not pleadable in satisfaction of a specialty. 615

Pleading a satisfaction is not sufficient without shewing an acceptance, 573

Account.

In account a discharge to a common intent is sufficient. 680

Actions popular.

Leave given to compound, on affidavit of the defendant's poverty. 167

Proceedings staid, for the cause arising in another county than where *B. R.* sits. 415

The act 21 *Jac. 1. c. 4.* for filing affidavits, does not extend to a subsequent penal statute. 1081

No information lies at the assises for non-residence. 1193

The statute 21 *Jac. 1. c. 17.* does not give a new jurisdiction to the assises, &c. 1103

Where

Where the plaintiff is out of the land, proceedings shall stay till security given. *Page 697*

Plea of a recovery in a former *qui tam* action must shew the day each bill was exhibited. 1169

A corporation cannot sue as a common informer. 1241

Defendant cannot plead double in a *qui tam*. 1044

A *qui tam* information cannot be quashed on motion. 953

Action sur case.

For malicious prosecution must shew how it was determined. 114

Where the act is lawful, as the fixing a spout, and the consequence is injurious; the remedy is by case and not trespass. 634

Action lies for a malicious prosecution of a bad indictment. 691

Trespass on the case is not within the statute *Will. 3.* that gives costs to an acquitted defendant. 1005

Lies for knowingly keeping a dog used to bite, though the damage happened by accidental treading on him. 1264

Addition.

Addition of late of *London* merchant good, though defendant is commorant at *Middlesex*. 924

If this be pleaded the court will set it aside on motion. 924

See *Abatement, Same.*

Adjournment.

Of adjournments into parliament *propter difficultatem*. 380

Administrator.

Mandamus granted to commit administration, generally. 552

Mandamus lies not for an administrator *durante minoritate*. 892

The spiritual court may revoke an administration if granted on wrong suggestion. *Page 911*

The spiritual court may award a commission of appraisement before granting administration with the will annexed. 956

As to what acts the administration shall relate. 97

Though a feme has power to make a will, yet the baron shall have administration. 891

Where the husband has departed from all interest in the wife's fortune he shall not have administration. 1111

Though the wife has a separate estate at her disposal and makes a will, yet if there be no assent of the husband he shall have administration. 1118

The spiritual court may take a bond for a due administration *cum testamento annexo*. 1137

An administrator *pendente lite* about a will may bring actions. 917

An administration may be pleaded *pro darrein continuance* to justify a retainer. 1106

Form of declaring against administrator in *B. R.* 788

Admiralty.

Ship carpenter may sue in the Admiralty for wages. 707

Boatswain may sue in the Admiralty for wages. 858

Mate who afterwards becomes master can sue in the Admiralty only for his wages as mate. 931

Where the contract is under seal mariners cannot sue in the Admiralty. 961

The Admiralty jurisdiction for wages may be superseded by agreement. 401

One part-owner may sue another who is going to sea, to give security for the ship. 891

One part owner may sue without the others on the statutes of *R. 2.* 104

Prohibition to the Admiralty of the cinque-ports, to stay a suit for pilotage of ships not being of the society. 21

The matter cannot hypothecate the ship before the voyage begins. 169

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I N D E X.

Where a deed comes in by incident, the Admiralty may try whether it be fraudulent. Page 761

If a suit is pending in *B. R.* against one in the Admiralty custody, he must be turned over to the marshal. 936

Sentence of a foreign Admiralty condemning a ship as unfit, not to be read in an action on the charter-party. 1078

Adowson.

Mortgagor shall present to a living till foreclosure. 403

Adowson is assets. 879

Presentation makes and proves the seisin of an adowson. 1011

See *Quare impedit*.

Affidavits.

Affidavits may be read in aggravation, where the matter contained in them cannot subsist as a distinct crime. 441

Affidavits sworn before a Judge in *Ireland* read in *England*. 545

On a motion to submit to a fine, the defendants being returned rescuers affidavits read denying the fact of an arrest. 642

How affidavits must be intitled. 704

Affidavits requisite to a plea in abatement in the crown-office. 1161

Suppletory oath, in what case to be admitted. 80

Old affidavits not sufficient to hold to bail. 1270

An affidavit that he has good reasons to suspect that the fact was done by *A.* and *B.* is not a sufficient compliance with *9 Geo. 1. c. 22.* to entitle plaintiff to recover in an action against the hundred for burning his barn. It should be that "he suspected them to be the men, but did not know it." 1247

See *Abatement*.

Age.

In what cases the parol shall demur on a writ of error. 862

Vol. II.

Agreement.

Agreement made upon good consideration is to be considered in equity as performed. Page 456

Specific performance decreed, where the party insisted to forfeit the penalty. 533

Tenant for life with power to make a jointure, remainder over, covenants in consideration of a marriage portion to make one out of certain lands, but dies before a compleat execution of the power, according to his marriage articles; the remainder-man decreed to perfect it. 596

Held also that the remainder-man had no equity to have the lands exonerated out of the personal assets of the covenantor. 596

The husband covenanted to take up his freedom in *London* but did not: his estate distributed according to the custom. 455

No carrying a voluntary parol agreement to make a settlement into execution. 738

Alien.

Not to be pleaded to a personal action, without alleging the plaintiff to be an enemy. 1082

Almanack. See Sunday.

Ambassadors.

Privilege of Ambassadors. 797

Amendment.

Appearance by attorney where it should be by guardian, amended, the attorney having undertaken. 114

Appearance of infant by attorney, held not amendable after error. 445

Leave given to file a new bill to amend by. 583

Declaration amended by bill filed, after special demurrer and argument. 954

Y y

In

In an action against a returning officer,
for refusing a copy of the poll, several
mistakes amended. Page 136

Action for double damages on a false
return amended after error. 1227

Amendment after plea in abatement.
11

Intravit for *intraverunt* in a declaration
amendable. 807

An *assumpsit* laid to the testator, amended
and made to the executors, after
issue joined. 890

On plaintiff's amending, defendant may
elect to have an imparlance or costs.
930

Amendment of the declaration by the
bill filed, after verdict. 1151, 1162

Entering continuances or other ministerial
acts amendable after the term at
common law. 139

Amendment by adding continuances.
734

Defendant's plea amended by the coun-
sel's draft. 846

Replication to a special *plene administra-
vit* not amendable after trial and ver-
dict set aside. 1002

Plaintiff may change the venue by
amending. 1162, 1202

Declaration in ejectment held not amend-
able. 1211

Ejectment amended by making the verbs
in the plural. 807

Declaration in ejectment amended by
enlarging the term without consent.
1272

Uncertainty of a judgment as to the term
in ejectment amendable. 682

Scire facias not amendable, but must be
quashed. 401, 1165

An information amended, 185, 871
after plea in abatement. 739

Information not amendable in the venue.
911

Counts in an indictment can not be
struck out. 1026

Plea to *scire facias* at the suit of the
crown, amended. 686

Plea to information of *quo warranto*
amended. 976

Name of a juryman amended at the
trial. 1214

Want of a *similiter* not aided or amend-
able. Page 641

Writ of inquiry amended by the judg-
ment. 684

Amendment of judgment by the ver-
dict. 787

Variance in the *nisi prius* roll amended
by the plea roll in indictment for for-
gery. 843

Should recover, for *do* recover, amended
after error, 1132. *Shall* recover, 1156

Judgment amended after error, by in-
serting *that the plaintiff ought to re-
cover*. 1182

Postea amended by the Judge's notes.
1197

Special verdict, that a bankrupt bought
and sold great quantities, amended as
to the quantities, on affidavit that
they were proved at the trial. 514

An old judgment by confession is not to
be amended. 1209

What writ of error is not amendable
807

Writ of error amended by striking out
a plaintiff. 891

Writ of error amended without costs
861

The court *ex officio* may amend a writ
of error. 901

Writ of error returnable before judg-
ment given, not amendable. 801

A new roll ordered to be made up, the
former being lost. 891

A new writ of inquiry ordered to be
made, on loss of the former. 1071

A new *postea* ordered, the former being
lost. 1201

The sessions can not amend orders
adding new averments. 1101

After error in the Exchequer-chamber
the amendments must be made in
R. 801

Amends,

See Trespass.

Amercement.

In *miseriordia*, &c. is a good entry
the amercement of a peer. 801

I N D E X.

Where a *nolle prosequi* is entered, the plaintiff need not be amerced. *P.* 574
Must be by the court, and not by the jury. 847

Answer.

Where a man submits by covenant to answer, he shall not protect himself by pleading penalties. 168

Appeal to Sessions.

Appeal may be dismissed for want of the notice appointed by the sessions. 315
Appeal must be to the next sessions after removal, not date of the order. 831

Appeal of felony.

Acquittal on an indictment for murder is a foundation to bail upon an appeal. 855
Appellee convicted on the indictment and pardoned, not bailable. 858
Writ.

Appearance.

Effect of summons cured by appearance in a conviction before justices. 261
If an infant refuses to name a guardian to appear by, the plaintiff may do it for him. 1076
Amendment.

Apprentices.

The sessions have an original jurisdiction to discharge apprentices. 143, 704
Discharging an apprentice without assigning a good reason in the order, is ill. 704
They can not discharge for sickness. 99
Doing him unkindly is not a sufficient reason in an order of discharge. 1014

Can not be discharged without appearance or summons of the master.

Page 1013

Justices can not order money to be returned when they discharge him. 69
Apprentice bound and inrolled in London may be discharged by the justices where his master lives. 663
Apprenticeship is dissolved by death of the master. 1266
Apprentice after his master's death turned over by his widow with his own consent, gains a settlement. 1115
Bankruptcy of the master does not discharge the apprentice, though it may be a reason for discharging him. 582
Assignment of apprentice bound out by the justices, not to be vacated by the sessions. 48
One of the justices to allow a binding must appear to be of the *quorum*. 1110

Money allowed for cloaths is not chargeable with the stamp duty. 1132
Apprentice bound for four years gains a settlement. 1066
Indictment for not receiving an apprentice must shew the binding to be according to the statute. 1268
Where the apprentice duty is not paid, the apprentice gains no settlement. 903

See Settlement.

Arbitration.

Rule made upon a witness to a submission to arbitration, to make affidavit of the execution. 1
The statute 9 *W. 3. c. 15.* does not extend to submissions by rule of court. 301
Executing an award by process of contempt is discretionary, and the court will not do it when there are contradictory affidavits as to the due performance. 695
When an award has general words sufficient to take in all matters evidence cannot be admitted that some thing was not taken into consideration. 647
Y y 2 A de.

I N D E X.

A demand as executrix is within a general submission of all matters in difference.

Page 1144

Arbitrators award a party to pay costs, the master shall tax them. 737

Award that *A.* shall execute a covenant to indemnify *B.* is good. 903

In debt on an award a mutual submission must be shewn. 923

Award to give security for an annuity, not saying what security, uncertain. 1024

To stay proceedings, not final. *ib.*

Award to pay costs to be taxed by one not an officer for that purpose, is ill. 1025

Awarding the giving a note is the same as awarding payment at a future day. 1082

A demand as executrix is within a general submission to an award. 1144

An award cannot be complained of till the submission is made a rule of court. 1178

See **Attachment.**

Arrest.

Justices' warrant, where he has not power to grant one, will not justify the officer. 1002

A battery cannot be justified by an arrest only. 1049

See **Wail.**

Articles of the Peace.

Threats or a fact committed before an act of grace, may be a ground for them. 473

See **Surety of the Peace.**

Assets.

An heir hath lands by hereditary descent, yet he shall not be liable for the debt of his ancestor any farther than to the value of the lands descended. 665

Adowson is assets. 879

Where a bond is forfeited in the lifetime of the testator, the penalty is the legal debt, and on the issue what

is due must cover so much assets; but on a bond where the day of payment is not come, the assets only can be covered for the sum in the condition. Page 1028

Lands devised to the heir for payment of debts are assets by descent. 1270

See **Executoz, Scire Facias.**

Assignment. See *Bankrupt—Debt to the King.*

Assumpsit.

To pay for a set of sails upon request, a special request need not be laid. 88

Forbearance is no consideration, where there was no cause of action before. 90

On a stock contract the difference held to be money received to the plaintiff's use. 406

Where the thing contracted for is not delivered, the money paid for it is received to the other's use. 407

A stranger to the consideration cannot maintain no action. 598

Where there is a special agreement, the plaintiff cannot go upon a general *indebitatus assumpsit*, unless the agreement is fully performed on the plaintiff's part. 64

Where a debt is to arise upon a condition subsequent, there must be an exact performance, to intitle the plaintiff to recover on a general *indebitatus assumpsit*. 66

No action lies for work done in expectation of a legacy. 78

Fees to usher of black rod recovered. 78

Masters of ships and owners are generally liable for repairs, unless done on a particular undertaking. 8

Where money is extorted by duress of goods, *assumpsit* will lie for it. 9

Assumpsit will not lie for a past consideration, unless it was at the request of the party. 9

Where a man has covenanted to count for money to be received for another's use, *assumpsit* will not lie. 10

I N D E X

Attachment.

Granted on the first motion for using the process of the court contemptuously.

Page 185

2. If an attachment goes absolutely where contemptuous words are sworn to only by one witness. 1068

On attachment the party is not bound to answer what may convict him of another offence. 444

Attachment for not performing an award, discharged by bankruptcy and certificate. 1152

Rescue.

See Contempt.

Attorney.

The different manner of proceeding against attornies in *B. R.* and *C. B.* 76

The manner of inrolling them. 77

Bound by his undertaking to appear for an infant. 114

A general admission of a *prochein amy* to prosecute all suits is sufficient. 304

The attorney ordered to pay costs, where the plaintiff could not be found. 402

Where the papers are lost, the attorney on the other side shall give a copy. 414

Replication *non est attorn'* must not conclude *al pais*. 532

In what cases the court will order an attorney to deliver deeds. 547

Attorney ordered by rule to deliver writings. 621

Attornies must deliver bills before they bring an action for them. 633

Where an attorney undertakes to appear, the court will oblige him to do it at all events. 693

Where warrant of attorney is given to execute a deed, it must be executed in the name of the principal. 705

Where there are two executors and one under age, they may sue, but cannot be sued, by attorney. 784

An attorney of *C. B.* must plead his privilege in *B. R.* and cannot be discharged on common bail. Page 864

The executrix of an attorney pays no costs, though a sixth part of the bill is taken off. 1056

Attorney present at putting in an answer, not obliged to give evidence. 1122

Clerk of the crown-office may have a rule for the original client to pay him. 1126

See Privilege.

Attornment.

Grantee of a reversion could not maintain covenant without attornment before the statute 4 *Ann.* 78

Grantee of a rent before the statute 4 *Ann.* cannot distrain without attornment. 106

Averment.

In *B. R.* calling the defendant administrator in the declaration is sufficient, without a special averment. 781

On a covenant to stand seised for love and affection, one named in the deed may aver himself a relation. 934

Where a *scilicet*, or *sciens*, may amount to an averment. 233, 904

Avowry.

In avowries commencement of particular estates must be shewn. 796

In avowry for an amercement in a leet, the avowant must aver that the plaintiff was guilty; *aliter* in trespass. 847

Authority.

An authority in matters relating to public justice is joint and several. 117

Judicia querela.

The court refused to set aside execution on a release of the testator, which

which was controverted and left defendant to his *audita querela*. P. 1198
Where *nichils* are returned on a *scire facias*, the court will relieve upon motion, if the party applies in reasonable time. 1075

Jward. See **Arbitration.**

Bail.

In what cases Bail is required.

THE act requiring affidavit of 10*l.* due, in order to hold to bail, does not supersede the act of 11 *Will.* 3. which requires affidavit of 20*l.* in the counties palatine. 1102
Affidavit of a debt as appears by the bond is not sufficient. 1157
Affidavit of belief of a debt is not sufficient. 1209, 1226
As appears by the testator's books, is not sufficient. 1219
An old affidavit is not sufficient to hold to bail. 1270
Defendant after a *non prof.* held to bail in a second action. 439
Held to bail in debt upon a judgment, where he might have pleaded bankruptcy in the first action. 477
No special bail in action on a second judgment. 782
Where the original debt does not require bail, the addition of costs will not warrant the holding to bail on the judgment. 975
To hold to bail in an inferior court there must be an affidavit of the debt. 934
No special bail on judgment, after defendant has been superseded. 1039
Special bail required in action by the loser for money lost at play. 1079
Special bail may be required in trover without a Judge's order. 1192
On a second writ (pending a first) common bail shall be taken. 1209
Where a defendant has been discharged on perjured bail, he may be held to

bail on a second writ before the first is discontinued. Page 1216

Common bail ordered in action on a new note given after the former action superseded. 1218

A debtor discharged on an insolvent act makes a new promise, he shall not be held to bail. 1233

Common bail ordered for money recovered in a foreign court. 1243

Putting in bail where not required, does not preclude the court from ordering common bail. 1077

Bail to the Sheriff and Bail above.

The sheriff cannot take bail on an attachment. 479

Sheriffs' officers ought not to be bail. 890

If the defendant neglects to put in bail, the bail bond is forfeited, though the plaintiff took no step to quicken him. 1262

A bail bond to appear to a writ returnable out of term is void on the face of it. 199

If the principal dies between the return of the *ca. sa.* and of the second *scire facias*, the bail are liable. 511, 717

Bail bonds need not pursue the words of the process. 115

Sunday not computed as one of the four days for putting in bail. 782, 91

Upon bonds the bail must justify double what is really due. 82

The bail to the sheriff may put in bail above against the defendant's will. 87

Bail may surrender before a right action is brought although another had been commenced by wrong process. 91

Where more is recovered than the sworn to, the bail are liable only for that sum and the costs. 91

The King's debtor may be brought by his bail at the suit of a private party, and surrendered. 61

Bail of a convict allowed to surrender discharge of themselves. 121

Ba
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Equitable
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I N D E X

Proceedings against Bail.

Bail bond cannot be assigned by the under-sheriff's clerk. Page 60
 Sheriff may assign the bail bond out of his county, and the action may be brought where the assignment is made.

727

In action on bail bond the arrest is not traversable. 444, 643

What amounts to the shewing a bail bond to be taken by the name of office. 893

Matter assignable for error by the principal, not assignable by the bail. 197

Proceedings against bail stayed, pending error by the principal, 419. But not till bail in error is put in. 781

Proceedings not staid on error brought, when the time for surrendering is lapsed. 443

But the bail may have four days after affirmance to pay the money. 1270

If the plaintiff obtains execution on *scire facias* against the bail, pending error, the court will not set it aside. 526

Bail who have neglected to surrender, may have execution staid till after affirmance of the principal judgment. 872

Where no bail in error is required, the bail applying to stay proceedings must undertake for the costs on the writ of error. 877

Scire facias must lie four days in the office before the return, as well where a *scire feci* is returned as a *nichil*. 644

May be served at any time before the rising of the court upon the return day. ibid.

Fifteen days between the *teste* of the first, and the return of the second *scire facias* are sufficient. 1139

Plaintiff cannot call for a return of the *ca. sa.* pending error. 1186

Scire facias on the recognizance cannot bear *teste* the same day that the party makes default. 1220

May be *teste* the day of the return of the *ca. sa.* 866

Capias ad satisfaciendum lies against bail, without a *fieri facias*. 822, 1139

Equitable costs not allowed out of the penalty of the recognizance. 826

Scire facias against bail is not amendable. Page 1163

Persons becoming bail in fictitious names, set in the pillory. 384

Bail in error.

No bail required in error on outlawry, till reversal. 951

Special bail required on reversing an outlawry, though no affidavit of the debt made originally. 1178

On error of a judgment on a bottomree bond, bail required. 476

On a second writ of error there must be new bail. 527

An executor is not obliged to give bail in error, but the court may take it. 745

Bail in error is not required on a bond to pay for such beer as should be delivered. 1190

Upon error in debt upon a bond, the bail is to be bound in double the penalty recovered; but by the course of the court it is sufficient if they justify in double what is really due. 821

Bail in criminal cases.

The common recognizance on a *certiorari* to remove an indictment, does not oblige to the payment of costs. 1165

Sickness, unless caused by the confinement, no inducement to bail one committed for high treason. 4

A year's imprisonment without prosecution inducement to bail in high treason. 5

Appellee of murder found guilty cannot be bailed without consent, though the appellant delays the prosecution. 402

Acquittal on indictment of murder is foundation to bail upon appeal. 855

Appellee convicted on indictment and pardoned, not bailable. 858

One charged with a murder in *Portugal*, not bailed. 848

In order to bail, the court will not examine whether the offence for which he is committed is of the same kind

Y y 4 with

I N D E X

with others of which he has been acquitted. *Page 851*

The depositions taken before the coroner, and not the verdict, are to guide the court as to the expedience of bailing for murder. 911, 1242

Court will not order a wounded person to be visited, in order to bail the offender. 547

A prisoner positively charged with a robbery, not to be bailed on affidavits of innocence. 1138

Information against a justice of peace for bailing a felon. 1216

Convict for a libel, being ill, bailed before judgment. 9

Where a statute inflicts imprisonment, the court on a *certiorari* returned may admit to bail, and after confirmation imprison for the rest of the time. 531

In an appeal of murder where it is by writ on the civil side, two bail are only required to bail appellee, *corpus pro corpore*. 855

But if it comes on the crown side by *certiorari*, there must be four. *ibid.*

Where on an indictment for murder the prisoner pleads a pardon before conviction, the court will not require bail for his appearance to answer an appeal. 1203

Bailiff.

An act of an agent cannot be affirmed as to part and avoided as to the rest. 859

A man sells goods or lays out money wrongfully, the owner may charge him as bailiff, or as a wrong-doer, at his election. 860

Bailment.

Delivery to the use of a creditor, vests the property before agreement, if he does not disagree after. 165

A parol gift, without some act of delivery, will not alter the property. 955

But a lodgers' leaving the key of his room with the mistress of the house, held a sufficient delivery to vest the property in her by parol gift. 955

On a bare leaving a thing in another's custody, the law raises a promise not grossly to neglect or abuse it. 1099

A factor cannot pawn. *Page 1178*

Bailee for safe custody cannot pawn. 1187

Where goods are sold by a factor at his own risque, the vendee held answerable to the owner. 1182

See **Bailiff**.

Bankrupts.

A farmer who buys and sells potatoes may be a bankrupt. 513

He who has the body in execution cannot be a petitioning creditor. 653

A debt contracted after an act of bankruptcy is no ground for a commission. 744

Note of above six years standing ground for commission of bankruptcy. 746

Assignee of a bond cannot petition for a commission of bankruptcy. 899

Note indorsed to a debtor of a bankrupt after the bankruptcy cannot be set off. 1234

Going out of town to gain the term an act of bankruptcy. 809

Bankrupt not admitted to prove his own act of bankruptcy. 828

Assignee of a commission may declare on a promise to the bankrupt. 697

What meddling with the effects of a bankrupt is a conversion. 813

A stranger disposes of a bankrupt's money in purchases, the assignee seizes part of the purchased effects, this affirms the whole transaction and he cannot maintain trover for the money. 859

Debt upon contingency not yet happened cannot be claimed. 869

All bonds, &c. payable at a future day are within 7 Geo. 1. c. 31. 1218

How far certificate is evidence of bankruptcy. 533

The bankruptcy of the obligor does not discharge a bond conditioned for his executor to do an act. 867

Bankrupt discharged from bills drawn before his bankruptcy, though protested and returned after. 949

Not discharged from a recognizance of bail on error where the affirmation is after the bankruptcy. 1049

Discharged

I N D E X.

Discharged of a contempt in not performing an award. Page 1152

Where the breach of a bond is after a bankruptcy the bond is not discharged. 1160

A bankrupt discharged from a judgment given after his bankruptcy for a debt due before. 1196

Separate creditor may come in under a joint commission of bankruptcy. 995

A joint commission discharges each partner as to his separate debts. 1157

Future effects of a second bankrupt continue his property till seized. 1207

Bankrupt discharged for faults in the commitment. 880

The fortune of a wife may be settled on husband till he fails, and then to her separate use. 947

Delivery to the use of a creditor vests the property before agreement if he does not disagree after. 165

See Debt to the King.

Bargain and Sale.

Pleading a bargain and sale without shewing it to be for a valuable consideration will be ill upon demurrer, but is cured by verdict or taking issue on a collateral fact. 1229

Baron and Feme.

May join in an action for rent of the wife's land. 229

The husband alone may sue for malicious prosecution of the wife *per quod* he was put to expence. 977

Shall join in action for the escape of one in execution for a debt to the wife. 726

In action by husband and wife, defendant not allowed to controvert the marriage on the general issue. 480

Trespass for entering the plaintiff's house and beating his wife. 61

Meat and drink found for the wife not allowed in evidence as found for the husband. 127

Where a wife goes away with an adulterer the husband cannot be charged for necessaries. 647

Husband not chargeable for goods sold to an adulterous wife. Page 706

Wife living in a lewd manner while with her husband, elopes, and afterwards desires to be received again, or allowed a maintenance. Husband refuses the latter, but says she shall live in his garret. He is not liable for her debts. 875

The husband not charged for necessities for the wife at a spunging house when she is committed for an offence. 1122

A husband who turns away his wife without cause and refuses to provide for her, cannot make a particular prohibition. 1214

Wife of one defendant not a witness for the other on an indictment. 1095

Wife witness on behalf of defendant to prove goods delivered on husband's credit. 504

Declaration of wife evidence against her husband in a cause for nursing a child. 527

Wife evidence against her husband on indictment for assaulting her. 633

Wife *de facto* may maintain trespass against her husband. 79

Wife *de facto* acquires for her husband during cohabitation. 80

Husband cannot stop the wife's proceedings in spiritual court for defamation. 576

Coverture of the defendant after the action brought cannot abate the plaintiff's writ. 811

In what case the husband shall be obliged in equity to make a provision for his wife in consideration of effects which he claims in her right. 239

Chancery will order a legacy to a wife to be put out for her use, where the bill is by the executor. 503

Though the feme has power to make a will, yet the baron shall have administration, 891, 1118. But not where he has departed with all interest in her estate. 1111

Married woman taken in execution not discharged without appearance of collusion. 1167, 1237

A wife

I N D E X.

A wife arrested for her debt *dum sola* discharged. Page 1272

A husband has not power to confine his wife without cause. 478

A feme covert may be convicted for selling gin. 1120

In usum suum proprium converterunt is well enough in trespass against them. 1094

Husband may pray surety of the peace against his wife. 1207

Bar. See Account, Heir.

Bastard.

In an order of bastardy made at the sessions a summons is presumed. 475

A woman with child of a bastard is removed, and privately returns and is delivered, the settlement of the bastard is where she was sent. 476

The sex of the bastard must be specified in an order. 503

Where two justices have made an order, the sessions have no jurisdiction but upon appeal. *ibid.*

Bastard chargeable only where born. 644

After defendant is discharged at sessions a new order of bastardy cannot be made. 716

Order to provide for bastard till nine years old, if it should so long live good. 788

That the husband was absent six years and defendant had knowledge of the wife, no good ground for order of bastardy. 811

Though the husband is in England, yet if no access can be proved the issue are bastards. 925

Where it is found the husband had no access, there is no presumption of legitimacy. 51

Where access is presumed, yet evidence may be given of the impossibility of begetting children. 940

If no access of the husband be adjudged, the issue are bastards. 1076

A bastard is within the statute of *P. & M.* against taking away young women. 1162

There must be a *quorum* in an order of bastardy by borough justices. Page 974

Two justices cannot acquit a man charged with a bastard. 1056

The parish cannot appeal against an order of bastardy, though the defendant may. *ibid.*

A bastard intended to be born where the order states him to be baptized. 1166

Bastard of a certificate person is settled where born. 1168

Battery.

A battery cannot be justified by an arrest only. 1049

See Trespass.

Bills of exchange and promissory notes.

Cash notes.

A party receiving a goldsmith's note and tendering it the next day according to usage does not bear the loss. 419

Cash notes left and cancelled in order to receive the money, and renewed notes taken upon a stop, does not throw the loss upon the taker of the notes. 416, 559

Within what time a goldsmith's note must be demanded. 308, 707, 910, 1171

Note paid away in the afternoon and stopped next morning must be made good. 124

Bills of Exchange.

A bill payable out of a particular fund is not a bill of exchange. 59

Pay out of my half-pay by advance good bill. 76

A bill not payable to order, &c. a bill of exchange. 121

There may be a partial acceptance of a bill of exchange. 21

What amounts to an acceptance of a bill of exchange. 6

Inter

I N D E X.

Interest given from the time of acceptance. *Page* 649

A man cannot be sued here on his acceptance of a bill of exchange abroad, after he has been discharged by the laws of that country. 733

Indorsee indulges the acceptor for 20 days, the risque is his own. 792

Need not aver the acceptance of a bill was in writing. 817

The acceptor cannot set up forgery of the bill. 946

Action lies against a servant upon a bill drawn on him and accepted generally, though the order is to place it to the account of the master. 955

A parol acceptance is sufficient in action against the acceptor. 1000

Acceptance of a bill of exchange to pay when the goods are sold, good. 1152

An acceptance to pay at a goldsmith's must be tendered within the same time that a note must. 1195

Acceptance to pay as remitted, no absolute acceptance. 1212

In action against the acceptor of a bill the hand of the drawer need not be proved. 648

Indorfor of bill of exchange may be charged, without resorting to the drawer, 441, 515. *Contra* in notes, 649, 1087.

The indorfor may be alleged to be liable according to the tenor of the indorsement. 478

A contempt to take out execution both against the drawer and indorfor. 515

Some covert cannot indorse a bill of exchange 516

The order of an indorsee may sue on a general indorsement to him only. 557

Holder of bill must tender it before the three days of grace expire. 829

Interest on a bill not to be allowed without a protest. 910

Where a man has owned his hand to an indorsement, he shall not set up a defence of forgery by similitude. 1051

Gaming.

Promissory notes.

The day is material in setting forth a note, 22

Note to pay two months after the ship is paid off is good. *Page* 24

Note to be accountable for money is within the statute. 629

What a negotiable note. 706

Note payable so many days after marriage not a negotiable note. 1151

A note payable so many days after the death of the drawer's father is good. 1217

Note to deliver horses, &c. and pay money, not within the statute. 1271

A note to pay for the debt of another, is negotiable. 264

A note alleged to be written by the defendant, need not be said to be signed. 399

Fecit notam per quam promisit solvere import a signing. 609

Consideration of a promissory note inquired into. 674

Debt lies not upon a promissory note. 680

Within what time a note ought to be demanded. 910

Where part of a note is received of the drawer, the indorfor is not to be resorted to for the rest. 745

A joint or several note how to be declared on. 76, 819

There must be a demand on the drawer of a note before indorfor can be charged. 649, 1087

Indorsement of note struck out at *nisi prius*. 1103

After judgment by default a promissory note set out in the declaration need not be proved. 1149

The innocent indorsee of a gaming note can maintain no action against the drawer. 1155

Note indorsed to a debtor of a bankrupt after the bankruptcy cannot be set off. 1234

If indorfor pays part of a note, demand on the drawer is unnecessary. 1246

Notes may be indorsed by an administrator. 1260

Bond.

The breach must be set out, as particularly as the covenant. 227

Bond to refund part of a portion set aside. 240

Bond

If any interest was paid upon an old bond after the day, it must be a plea upon the statute. *Page 652*

The indorsement of interest being paid within 20 years shall be given in evidence though under the hand of the obligee. 826

Indorsement made by obligee on an old bond after the presumption had taken place, not admitted in evidence. 827

The *solvendum* in a bond may contain a sufficient description of the obligee. 945

Vide **Resignation, Trade.**

Books.

Where a rule may be had to inspect them. See **Evidence.**

Bridges.

They who are not chargeable to repair of common right may discharge themselves upon Not guilty. 180

The king's bench has concurrent jurisdiction with the sessions about repairing bridges. *ibid.*

Certiorari may be granted where private persons are charged to repair a bridge. 900

Bringing money into Court. See **Tender.**

Brokers and stockjobbers.

Bail required in an action for not retransferring stock. 497

What is a good registry of a South Sea contract. 585

Burglary.

Opening a chamber door, with intent to commit a rape, held burglary. 481
Servants let in a thief, it is burglary in both. 881

By-laws.

A by-law consisting of several particulars may be good in part and void for the rest. 469

Where a corporation has a power to make statutes they cannot give themselves a power to administer an oath. *Page 537*

By-law to oblige a joiner in London to be free of the joiners' company good. 675

By-law to confine brewers to certain hours for carrying out drink, good. 1088

Where the charter grants the election to the body, a by-law may restrain it to a select number. 314

By-law to regulate and restrain the carriers in London. 461

See **Corporations.**

Canon-law.

THE canons of 1603, do not *prio vigore* bind the laity. 109

Suppletory oath in what case to be admitted. 8

See **Ecclesiastical persons and jurisdiction.**

Carrier.

A hoyman not answerable for goods lost by the accidental oversetting of the hoy. 1

Not liable for contents of package when he is deceived. 1

If I send my servant with the goods, the carrier is not liable. 6

Certainty.

A piece of *tepee* well in trover. *Parcela sequestrum, involuorum & nium, Anglice, &c.* sufficient in trover. 1

Trover de 50 *peciis materie quadratæ Anglice timber*, sufficient. 1

Ejectment lies not for a tenement. Trover for a parcel of diamonds, sufficient. 1

Mesugium sive tenementum is well enough in trespass. 1

Levavit vel levare causavit, ill. 8

I N D E X.

Sciens in an indictment is a good averment. Page 904
In causa defamationis five convicii, uncertain. 946
Excommunicato capiendo in a cause for slander or defamation held well. 950
 Judgment arrested for the generality of the charge in an information. 999
 Replevin for fourteen skimmers and ladders, certain enough. 1015

Certiorari.

The justices refuse to grant relief for malt burnt, this is not removable by *certiorari*. 391
 Where a *certiorari* is of common right. 609
Certiorari to remove an order of two justices may be directed to the sessions, and returned by them. 470
 Quashed for variance in naming more defendants than are in the record. 116
Certiorari to remove an indictment need not describe whether the offence be laid *contra formam statuti*. 845
 To remove an indictment for not doing the statute-work on the highways. 849
Certiorari may be granted where private persons are charged to repair a bridge. 900
 To remove an order for producing churchwardens' books upon an appeal. 991
 To remove an order before appeal, where the time for appealing is not limited. *ibid.*
Certiorari to Old Bailey without special cause. 583
Certiorari to the Old Bailey for a defendant. 1049
Certiorari to Old Bailey on the prosecutor's attorney being under-sheriff. 1068
Certiorari for defendant to Judges of Assize. 1202
Certiorari pro rege lies in case of highways though no affidavit or recognizance. 1209

Will be granted to remove an indictment from the Old Bailey in particular cases. Page 549, 717
 To remove an indictment for forgery denied, though the defendant had been punished for the same offence as a contempt. 877
Certiorari relating to the highways taken away by 3 & 4 W. & M. though to remove orders made on a subsequent law. 944
 The poor's rate is not to be removed. 932, 975
 Costs are not to be paid where any material part of an order is quashed. 1198
 A verdict cannot be removed from the sessions before judgment. 1228
 Lies to remove an indictment of misdemeanor from *Wales*. 704
 No second *certiorari* to reverse a judgment. 765, 819

Challenge.

A juror withdrawn in order to a view may be sworn on the jury afterwards. 70
 Challenging for want of hundredors, contrary to the special jury rule, a contempt. 593
 Challenging the array of a special jury for the sheriff being interested not a contempt. 1000
 One challenged sworn as a tales-man, ill. 640

Chancery.

Authority of the Chancery of Great Britain. 149
 Foundation of its jurisdiction. 150
 Where a man by deed submits to discover in equity matters which may be penal, he shall answer. 168
 A subsequent title, which is both legal and equitable, destroys a prior equitable title. 240
 Will provide for payment of a debt, on a bill to discover assets, &c. 403
 Will grant perpetual injunction after two trials at bar. 404
 Rule

I N D E X.

Rule not to relieve against forfeiture,
but where they can settle a satisfac-
tion. *Page 453*

Where a patron makes an ill use of a
bond of resignation, Chancery will
grant an injunction, 534

After probate of a will, equity may in-
quire into the fairness of a residuary
bequest. 666

See Agreement, Baron and feme,
Legacy, Marriage Settlement,
Mortgage, &c.

Church of England.

Christianity part of the law of the land.
834, 1113

It is a good custom, that persons admit-
ted to freedom be obliged to swear
upon the New Testament. 1112

B. R. will not grant an information
against a dissenter, for refusing a cor-
poration office, whilst the law is
doubtful. 1193

Churchwardens.

Where a custom of electing cannot take
place, recourse must be to the canon.
145

Parish officers of a donative are subject
to the spiritual court. 715

Churchwardens cannot commence a suit
after their year is expired. 852

But if commenced within the year they
may proceed in it after. *ibid.*

Where churchwardens have accounted,
they cannot be cited again. 974

Prohibition to settling churchwardens ac-
counts. 1133

Of common right the electing church-
wardens is in the parson and parish-
ioners. 1246

If the parish neglect, yet the ordinary
cannot appoint churchwardens. 52

Swearing in a churchwarden, a ministe-
rial act. 609

B. R. will not grant a *mandamus* to hold
a vestry for chusing church-wardens.
686

The curate may nominate a church-war-
den for the minister. 1246

Clerk of the Crown.

Proceedings on writs of *noſtante* on the
crown side. *Page 622*

Clerk of the Peace.

On removal of clerk of the peace the
evidence need not be set out in the
order. 996

Coining.

Having coining tools indictable. 1074

Colleges.

Offences against the private statutes of
a college are not pardoned by the act
of grace. 912

The visitor may punish a man for an act
done by him jointly with others. 913

Commissioners.

All acts done by commissioners must be
signed during their sitting. 566

Commitment.

That he be kept safe and close in
commitment by the Secretary of State
is only by way of direction to the of-
ficer.

Commitment may be without oath. *ibid.*
For high treason generally is good. *ibid.*

Exceptions to the form of commitment
for high treason. *ibid.*

Warrant of a justice committing a de-
feater on a conviction affirmed on
Geo. 1. c. 15. held good, without re-
citing that the rule of affirmance was
delivered to him. 16

Commitment till he gives security to ob-
serve university statutes for life, ill. 9

The commitment must specify what gaol
the party is sent to. 93

Commitment of a bankrupt for not ful-
filling his effects, must state that
interrogatories were exhibited for
examination

I N D E X

examination, pursuant to 1 Jac. 1. c. 15. Page 879

That he prevaricated in his examination is too loose a statement of the ground of his commitment. *ibid.*

If the commitment be till he make a full disclosure "or be otherwise delivered by due course of law." *Quære* if fatal. *ibid.*

Common.

Commoner cannot justify dispersing fern ashes burnt by a stranger. 777

Condition.

Distinction between conditions precedent, and concurrent acts. 459

A. is to transfer stock and *B.* to pay for it, the transfer is not a condition precedent. 535

A. makes a condition precedent in a covenant to pay money for stock at a day certain. 569

Where a plea is general *quod indemnem conservavit*, it must be shewn for cause that it does not say how. 681

In an action for money covenanted to be paid for stock, it is no plea for the defendant, that the plaintiff did not tender. 712

Condition to pay on or before such a day, issue on payment on the day immaterial. 994

An entry by a stranger without authority is good to take advantage of a condition, if it be assented to afterwards. 1128

The condition of a recognizance to surrender in an inferior court, is performed by a render above, if the cause be removed there. 49

Devise to *A.* for life, remainder to *B.* in fee, with condition, that if *C.* in three months pays to *B.* 500*l.* then *C.* to have the fee: this condition will descend to the heir of *C.* 129

Conspiracy.

An indictment for a conspiracy to ruin the prosecutor's trade, evidence that

all the defendants acted in it and lived in the same family held sufficient, Page 144

May be charged without an overt-act. 193

Judgment may be against one defendant before the other is tried. *ibid.*

One conspirator may be convicted after the other is dead. 1227

Constable.

Action against a constable not confined to the proper county, where he does not act in execution of his office. 446

Sessions cannot discharge constables appointed at the leet. 798

Indictment lies for not taking the office of constable. 920

Constable may make a deputy. 943

The sessions can only appoint constables, until the lord shall hold a court; not for a year or till others be chosen. 1050

Constable may be sworn in before a justice of peace. 1149

Action lies against a constable upon the *habeas corpus* act, for not giving a copy of the commitment. 167

Quo warranto lies for the office of constable. 1213

Mandamus to reimburse constables their extraordinary expences. 42, 93

Vide *Warrant*.

Contempt.

Rule for an attachment against defendant convicted on the game act, for suing, and against the town-clerk for granting a replevin of goods distrained for the penalty discharged, for it is only a contempt to the inferior jurisdiction of the justice. 567

Custos brevium of *C. B.* committed for not returning an original on a *certiorari*. 63

Contemptuous words on the delivery of an ejectment punishable. 567

Contempt of one court not to be punished by another. 567

Quære

Quere whether one can be deprived of accademical degrees for contemptuous words spoken of the chancellor's court, to the officer upon service of its process. *Page* 564

Release of plaintiff in ejectment, or assignment of his death for error, is a contempt. 899

Challenging the array when a special jury had been struck. 593

Challenging the array of a special jury, for the sheriff being interested, not a contempt. 1000

Revoking a submission to an arbitration that has been made a rule of court is a contempt. 593

Service of process on a party attending the court, a contempt. 1094

Escape warrant does not lie against a prisoner for a mere contempt. 99

Attachment against a sheriff for granting a replevin where it does not lie. 1184

A person ordered to attend, shall not be examined on oath by the adverse party. 1197

If the costs are not paid on bringing money into court, the plaintiff must go on, and cannot have an attachment. 1220

Contempt in putting in fictitious bail. 384

Contempt in a witness not to obey a *subpoena*. 510, 810, 1054

Voluntary escape, not a contempt. 532

A *mandamus* is directed to two bailiffs, and one of them refuses to make return; it is a contempt in both. 808

See Attachment.

Continuance.

Whether in *B. R.* the continuances may be entered *de die in diem*, or only from term to term. 492

The *scire facias* on error must be returnable as the original process was. 694

See Amendment, Discontinuance.

Convictions.

Defect of summons cured by appearance in a conviction. *Page* 261

Conviction presumed right if the contrary does not appear. 608

Of deer-stealing, good without appearance. 44

In summary convictions the evidence must go to the fact, and not generally that the defendant is guilty. 310

In convictions for swearing, the oath must be set out. 497, 680

In convictions the evidence must be set out. 67, 919, 909

Conviction good, where only laid, that the evidence was read to the party. 124

Where justices have a power to convict on the oath of one witness, they may convict on confession. 54

It must appear in the conviction that the justices are of that county where the offence was committed. 26

If the information in a conviction for killing game under 4 & 5 *W. & M.* 23, states defendant to be an inferior tradesman, it need not state him to be a dissolute person. 711.—It need not state that defendant did unlawfully hunt: 711.—But it is otherwise in conviction for deer-stealing. 712. "it set forth that the information was given to *A.* being a justice, &c. need not say *ad tunc* a justice." 71

On the game laws, must set forth how the offender is not qualified. 6

In conviction for keeping an alehouse not necessary to shew he was punished under the former act. 59

In convictions for non-payment of money the sum must be mentioned. 90

Conviction under turn-pike act for refusing to account and pay over the money received as collector, this being bad in part for not specifying the sum must be quashed as to the not accounting. 90

In convictions there must be a judgment *quod forisfaciat*. 8

An excuse under a proviso need not be taken notice of in a conviction. 11

Conviction of forcible entry in the preterperfect tense, ill. 4

I N D E X

Proceeding upon convictions must be in the present tense. Page 608

Where there is a conviction, the court will not discharge on the warrant of commitment, without having the conviction before them. 794

Conviction must be removed before the court will hear a motion against the justice. 915

Conviction affirmed after the death of the party. 937

Certiorari to remove a conviction upon the hawkers and pedlars act. 127

No replevin of goods taken upon a conviction. 1184

On condemning a horse on the acts for preserving the highways, the owner must be summoned. 1181

See *Deerstealers, Swearing.*

Consuance of Pleas.

What is necessary on claiming consuance. 810

Copyhold.

No relief against a voluntary forfeiture of copyhold. 447

The original of copyhold estates. 452

Surrender of a copyhold to the following uses, declared by marriage settlement; *To the father for life, remainder to the first son, &c.* in tail, &c. if there has been an admittance upon it, the act of the tenant for life cannot induce a forfeiture, so as to affect the right of the son.—

But it seems otherwise if there has been none. 454

copyholder *ex parte materna* devises to his heir, who dies before admittance, the lands remain descendible to the heir on the part of the mother. 487

Tenant for life by a marriage settlement of a manor is intitled to a general fine from the customary tenants upon the death of the last admittling lord. 654

Fines to be set according to the improved value. 1042

A fine certain may in pleading be called a reasonable fine. 1070

Vol. II.

Custom to bar intails of copyholds by recovery or surrender, good. P. 1197

Coroner.

Coroner ought to view the whole body, 22. Filing an inquisition taken *super visum corporis* five years after the death when only the head was to be found, staid, 22. Seven months is too late. 22

Punished for ill practice. 69

Must have leave of the court, to take a new inquisition *super visum corporis*. 167

Rule for coroner to take up the body on the inquisition being quashed. 533

Coroner not obliged to return depositions. 1073

Where a man of war is *infra corpus com'* the land coroner may go aboard. 1097

Corporations.

Common freemen not within the corporation and test acts. 828

A corporator on a recent prosecution must prove receiving the sacrament within a year. 585

How far the act requiring magistrates to abjure the covenant was binding. 120

The election of a mayor may be restrained by a by-law to a select number, though appointed by the charter to be out of the whole body. 314

Mandamus may be granted to go to an election though there is a mayor *de facto*. 1003

Annual officers continue till successors are chosen. 625

Where the mayor is to be sworn before the last mayor, there must be his assent to the swearing as well as his presence. 994

Where the presence of an officer is required yet his consent is not necessary. 53

On a summons of the members, if one is omitted, it is not a corporate assembly. 1051

Z z

Where

Where particular powers are lodged in a select number, they cannot separate and act, upon a general summons of the whole body. *Page 385*

Name of corporation may be acquired by reputation. 614

Dutch West-India company sue for money in *England*, which was borrowed at *Amsterdam*, and when it was payable in bank there, and have judgment. 612

Plea setting out a bad title to an office, is a confession of an usurpation. 394

Where a charter appoints a particular mode of electing a mayor, and directs that he shall take an oath to execute the office for a year, and until another shall be chosen, and a subsequent charter after reciting the former manner and time of election, and of continuance in office under it, and that the corporation had petitioned the crown *quatenus*, it would alter *modum et tempus eligendi* of the mayor, then abolishes the former manner of election, and after confirming all their former rights and privileges appoints this election to be in a different manner and upon a different day *pro uno anno integro tunc proxime sequen'* the right of holding over is thereby taken away. 394

A corporation cannot sue as a common informer. 1241

See *Quandam, Quo warranto*.

Costs.

Where executor is plaintiff, and money is brought into court, if he recovers less, he shall only lose his subsequent costs. 796

Where executor must declare as executor he shall pay no costs. 682

Executor shall pay costs on a writ of error of a judgment after *devastavit*. 977

Administrator discontinues without costs. 871

On *scire facias* against an executor, judgment for the plaintiff with costs; reversed as to the costs, and affirmed as to the residue. 183

Where a *scire facias* is abated by a plea, there shall be no costs. *Page 638*

After where party moves to quash his writ before plea. 16

Infant pays no costs on a bill filed by the *prochein amy*. 708

Trespass on the case is not within the statute of *W. 3.* that gives costs to an acquitted defendant. 1005

If the plaintiff in prohibition prevails in any part of the case, he shall have costs. 1068

No costs upon a writ of *noctanter*. 1068

In trespass for putting diseased cattle in the close, full costs, though under 40 s. 19

In trespass for chasing cattle full costs. 534, 535

Where there is a verdict for the defendant upon a justification, a verdict against him upon the Not guilty shall not intitle to full costs. 57

A charge of beating the plaintiff's horse will not intitle him to more costs than damages. 63

Full costs for procuring the plaintiff to be carried before a justice. 63

Full costs not to be given for tearing down hedges, without an *assortment*. 63

Full costs not to be given for keeping the plaintiff out of possession. 63

Full costs where the issue is joined *extra viam*. 7

Certificate granted on 43 *Eliz.* against costs. 12

Suggestion for treble costs. 12

Action against a constable for detaining without warrant, and he acquitted evidence of plaintiff's consent; double costs. 12

Costs *de incremento* are to be double as well as those given by the jury. 12

Double costs ordered by rule. 12

Costs of a former trial given upon nonsuit. 12

Costs given for not executing a writ inquiry. 317

Costs given on discharging a rule *quo warranto*. 12

Costs on the statute for the court of science shall include the costs of suggestion. 12

I N D E X

In a *remittit* of damages the costs given
 by the jury are not considered. Page 420
 In ejectment the plaintiff has his elec-
 tion to pay costs to which defendant
 he pleases. 516
 Costs on quashing writs of error are to
 be given in all cases. 606
 Shall be given on quashing writ of er-
 ror, though costs were not recover-
 able in the action. 262
 Costs in error, where none in the origi-
 nal suit. 1084
 Where a judgment for a defendant is
 reversed, the plaintiff shall only have
 such costs as should have been given
 him in the court below. 617
 Quitable costs not allowed out of the
 penalty of the recognisance of bail. 826
 In bringing in principal and interest
 on the act for amendment of the
 law, costs on a writ of error brought
 by an executor are not allowed. 1072
 Costs cannot be set against costs. 1203
 Foreigner not obliged to give security for
 costs. 1206
 Prosecutors of informations shall pay
 costs for not going on to trial. 33
 Where a prosecutor is liable to pay costs
 for not going on to trial, if the de-
 fendant dies, his executor shall not
 have them. 874
 The court will oblige a prosecutor in
 some cases to pay costs on quashing an
 indictment. 946
 Costs on removals of indictments are
 not required on the common recog-
 nisance. 1165
 In equity praying relief, as to a
 mortuary dismissed with costs though
 defendant had not demurred to it,
 but gone into proof, as to the right. 715
Cottages.
 Houses contiguous to market towns, not
 cottages. 405

Covenant.

In covenant the plaintiff need not set
 out a title, *quod cum dimississet* is enough. Page 238
 In a covenant to pay or cause to be paid,
 the breach may be generally assigned
 that he did not pay. 231
 To save harmless against a particular
 claim, extends to tortious acts. 400
 For makes a condition precedent in a
 covenant to pay money for stock at
 a day certain. 569
 Covenant to accept stock and pay for
 the same, a tender is requisite on the
 part of the vendor. 616
 In an action for money covenanted to
 be paid for stock, it is no plea for
 the defendant, that the plaintiff did
 not tender. 712
 Where there is a covenant to pay rent,
 an action lies though the lessee has
 no enjoyment by the default of the
 lessor. 763
 Debt lies on a covenant in a deed. 1089

County.

The King may annex lands to a county. 180
 Separation of the ecclesiastical court
 from the county. 669

County palatine.

B. R. will expect a return of a *latitat* to
 Durham. 1089

Courts.

B. R. will not adjourn a writ of error
 into the Exchequer chamber, where
 the Judges are equally divided. 383
Curia de banco nostro means the King's
 Bench. 302
 Warrant for treason executed in court. 530
 See Ecclesiastical Persons and Juris-
 diction, Foreign courts, Interior
 courts.

Customs.

Officer of customs liable in trespass for wrong seizure, notwithstanding probable cause. *Page 820*

Goods that are not imported by way of merchandise pay no duty. *943*

Where a condemnation in the Exchequer is good, and where not. *952*

Custom. See Prescription.**Damages.**

WHERE two defendants confess a trespass, the damages cannot be severed. *422*

Where there were several defendants in trespass, and they pleaded severally, damages severed. *1140*

Severed in an action for malicious prosecution. *79*

The damages cannot be given separately against several defendants in case. *910*

Intire damages in verdicts severed by the court. *1036*

Though defendants who plead to issue are acquitted, yet damages may be assessed against defaulters. *1108, 1122*

Heir of one tenant to a writ of dower joins with the other in error, the subsequent damages cannot be given against the survivor only. *971*

If on a traverse to a return of a *mandamus* there is a verdict for plaintiff and damages are omitted to be given, no judgment can be entered for him. *1052*

No waiver of them, by plaintiff, can set this right. *1052*

Neither can it be supplied by a writ of inquiry. *1053*

Subsequent damages on error in dower must be ascertained by writ of inquiry. *972*

Writ of inquiry awarded for a defendant to supply non-assessment of damages. *1021*

In error on *quare impedit* the patron shall recover the interest of the half year's value in damages. *Page 93*

The greatest value presumed against wrong-doer. *59*

The plaintiff cannot enter a *remittitur* in another term. *111*

Writ of inquiry set aside for too small damages. *425, 125*

Days and times.

Fifteen days with the *teste* and return are good. *78*

Sunday not to be computed one of the four days for bail. *782, 90*

Four days countermand in a county cause must exclude the day of giving it. *80*

Countermanding notice in a town cause two days and in a country cause four days before the assizes, shall save cause for not going on to trial. *80*

Four days (one exclusive) before bond can be assigned. *90*

Term's notice must be given before first day in full term. *2*

In *assumpsit* the day is not material, and the plaintiff may allege a different day in his replication. *80*

Where the issue lies on the defendant the plaintiff shall recover though the cause of action accrued after the *memorandum*. *10*

The term in which bail is put in, one of the two terms which the plaintiff has to declare in. *60*

Change-alley computation is to be taken by calendar months. *60*

Debt.

Where money is lent on a pledge, borrower is liable, unless there is an agreement to the contrary. *90*

Though a bond is taken for a future contract debt, yet if it is after an act of bankruptcy the simple contract is not extinguished. *10*

Debt lies on a covenant in a deed. *10*

I N D E X.

Debt lies not on a promissory note. Page 680

On bond staid, on payment of principal, interest and costs, without regarding the costs of a former action. 699

A set off reducing the demand under 40s. does not affect the jurisdiction. 1191

Statute of limitations replied to a set off. 1271

Note indorsed to a debtor of a bankrupt after the bankruptcy cannot be set off. 1234

Where the payer does not apply his payment, the receiver may apply it, but he must not apply it to an uncertain demand, as to a debt from a testator. 1194

May be brought for rent by deed where the deed was made, or where the land lies. 776

Debt to the King.

Land-tax money in the hands of the collector is a debt to the King. 978

Where therefore the collector commits an act of bankruptcy on the 7th, and his goods are seized, under a warrant of the commissioners for land-tax money, the 8th.—A commission issues the 17th, the assignment is made the 19th, and the goods are sold under the warrant the 22d, the assignees can not bring trover to recover the goods, not having paid or tendered the money for which they were a pledge in the commissioners' hands. But this warrant binds the goods, not from the date, but from the time of seizure. 978

Debt can not bear *teste* before fiat. 749

Debtor.

After one county sessions has determined an insolvent debtor's case, he cannot remove and hear his case in another county. 1116

Declaration.

In *assumpsit* the day is not material, and the plaintiff may allege a different one in his replication. Page 806

The recital of the writ may aid a defect in the count. 1023

Common bail filed by plaintiff will not warrant any other persons delivering a declaration by the by. 1027

The court will not oblige consolidating of declarations. 1178

Deeds.

Indentura facta inter A. & B. imports a sealing by both. 512

Altering a deed by a stranger in an immaterial part does not make it void. 1160

An attorney must execute a deed in the name of his principal. 705

Per scriptum factum apud W. does not import a deed. 814

See *Proferet*.

Deer-stealers.

The description of a place *where deer have been usually kept* in 3 *W. & M.* c. 10. does not refer to the words *forest, chase, &c.* 1119

See *Convictions*.

Default.

No suggestion can be made on the roll by a defendant after default at *miss prius*. 46

Suffering judgment to go by default is an admission of the contract declared on. 612

See *Damages*.

Demurrer.

Want of attornment need not be set forth as cause of demurrer. 112

A slight informality fatal upon a special demurrer. 611

Z z 3.

Plea

Plea quod indemnem servavit, without shewing how, the fault must be specially shewn. Page 681

An immaterial traverse must be shewn for cause of demurrer. 694

In covenant by an assignee of lessors for rent reserved by indenture, if lessee pleads a special *nil habuit in tenementis*, plaintiff may take advantage of it upon a general demurrer, and need not reply to it. 817

Facts ill pleaded are not admitted by a demurrer. 842

Defendant must search for a *concilium*, for the plaintiff is not obliged to serve him with the rule where the defendant demurs. 1242

Deodand.

On Not guilty, the defendant can not give evidence of taking the goods as a deodand. 61

Departure.

In *indeb-assumpsit* the day is not material, and the alleging another day in the replication is no departure. 21

Contra in case of a promissory note. 22

Departure in an immaterial point must be shewn for cause of demurrer. 22

Infancy pleaded, and *exoneravit* rejoined, is a departure. 422

Deputy.

Constable may make a deputy. 943

The principal and not the deputy is intitled to fees new created after the deputation. 1027

Mandamus will not lie for one. 893

Descent.

When a man shall be said to come to lands by. 275, 277

Devastabit.

If a *devastavit* be returned, there needs no allegation of a conversion. 440

See *Executors*.

Devise.

Devise of copyhold lapses by death of devisee, notwithstanding the surrender. Page 445

A general devise to the heir is void. 498

Devise to *A.* and *B.* in trust for others in tail and in fee, is a devise in fee to the trustees though there be not the words heirs, or for ever. 798

Devise to *A.* for life, then in trust for testator's sisters *L.* and *E.* equally between them during their natural lives without committing waste, with proviso that whatever part of 500*l.* they may pay, his wife shall be reimbursed them by getting coal out of the premises "and if either of his sisters

"should happen to die, leaving issue

"or issues of her or their bodies law

"fully begotten, then in trust, for

"such issue or issues of the mother

"share, or else in trust for the sur

"vivor or survivors of them and the

"respective issue or issues; and if

"should happen that both the sisters

"should die without issue, and the

"issue or issues so die without issue

"or issues, then devise over in tail

"&c. The sisters take an estate for

"life only with contingent remain

"ders to their children. 798

A. seised in fee has two sons *B.* and both unmarried, and devises lands to trustees for 500 years, in trust, to raise younger childrens' portions and pay debts, remainder to the first and every other son of *B.* in tail, remainder to the second son in tail, remainder over this is a good executory devise to the first son of *B.* 908

Devise to an infant *in ventre sa mere* with a contingent remainder in case such infant die under age, and there is such infant; the devise over shall immediately take place. 1008

To his daughter and her children and their heirs (one child being born) gives a jointenancy in fee. 1108

To *A.* in fee, but if he dies before twenty one years or marriage and without issue, to *B.* If *A.* attains twenty one years the devise over fails, though he dies unmarried. 1108

De

I N D E X.

Devise to *M.* and her issue, lapses by death of devisee in the life of the devisor. Page 25

Devise to the heirs male of the body of *A.* the devisee shall take though not heir general. 35

Rise of executory devises. 130

An executory devise held good upon a contingency to arise a year after a life. 133

If my daughter die before her mother, or without heirs, and my wife have an heir male, I give him all, &c. not a good devise. 427

Devise to *A.* for life, and after to his heirs male of his body, and his heirs for ever, and for want of such heir male remainder over, is an estate tail in *A.* 729

What words in a will create an estate for life or in tail. 802, 849

To *A.* for life, then to trustees to preserve, &c. then to the heirs of the body of *A.*; gives an estate tail. 1125

By a devise of ground rents on leases for years the reversion passes. 1020

Cross remainders by implication must arise from words necessarily importing them. 969, 996

To *A.* for life remainder to *B.* provided that if *C.* in three months pay to *B.* 500*l.* &c. this condition will descend to the heir of *C.* 129

Though Chancery has not relieved against the heir in case of neglecting to perform a condition in time, yet they may against a devisee. 135

An executor is presumed to take a term as executor and not as devisee, without proof of his assent. 70

Testator has a term and the trust of the inheritance, and devises the lands by a will not duly executed; the term will not pass. 619

Discontinuance.

Continuance to a general return, instead of a day certain, is a discontinuance and aided. 947

If a plea begins only as to part, it is a discontinuance; but not if it begins as to the whole and is an answer only as to part. 302

Where a plea does not go to the whole, judgment may be signed at any time during the term of the *placita.* *P.* 303

In prohibition the contempt is but form, and the jury need not give any verdict about it. 482

An avowant can not have a rule to discontinue. 112

Upon a *scire facias* if defendant demurs alleging *the declaration* to be insufficient, a joinder in demurrer alledging *the writ* to be sufficient, no discontinuance. 775

But if it had been otherwise, it would. 14.

See Amendment.

Distress.

In trespass defendant justifies under a distress for rent, and shews that the appraisers were sworn before the headborough, though a constable was present, the parties go to issue, which is found *pro def.* the verdict shall be set aside and a writ of inquiry awarded, for as the constable was present the headborough had no power to administer the oath, so that defendant shews that the sale could not be justified. 873

The landlord must remove the goods at five days end, or he is a trespasser. 717

Trespass does not lie for taking an excessive distress, it should be case. 851

Where two parcels of land are distinctly let, there cannot be a joint distress for both rents. 1040

Impounding in another county does not make a trespasser. 1272

See Rents.

Distribution.

Where there is a legacy to the executor for his trouble, the surplus shall be distributed. 578

Spiritual court cannot order distribution where there is a legacy to the executor. 865

How the estate shall be distributed where there is a wife, a mother and brothers, but no children. 710

I N D E X.

148
A share of the *residuum* lapses, it must be distributed. Page 820
Borough *English* lands shall be brought into hotchpot. 935
The child of a freeman of *London* when of age may in consideration of a present fortune bar herself of her customary part. 947
Husband covenanted to take up his freedom in *London*, but did not; his estate distributed according to the custom. 455

Dower.

Lies not of a tenement. 625
Heir of one tenant to a writ of dower joins with the other in error, the subsequent damages cannot be given against the survivor only. 971
But the whole of the original damages should be levied upon him. 972
Subsequent damages in error in dower must be ascertained by a writ of inquiry. 972

Durefs.

A deed, &c. may be avoided by durefs on goods. 916

East-India Company.

THEIR supercargoes bound by their covenant to answer in equity. 169

Ecclesiastical Persons and Jurisdiction.

Separation of the ecclesiastical court from the county. 669
The canons of 1603, do not *proprio vigore* bind the laity. 1057
Parish officers of a donative are subject to the spiritual court. 715
Parish clerk is a spiritual officer, and may be there deprived. 776
A parish clerk may execute the office without licence of the ordinary. 942
Prohibition to suit by a clerk of a parish for fees. 1108

Donatio causa mortis not suable in spiritual court. Page 777

Executor may be sued for a legacy where he proves the will, though he does not live in that diocese. 847
Spiritual court cannot order distribution, where there is a legacy to the executor. 869
Suit may be in the spiritual court for a prestation, where the title made to it in the libel is general, although the plea put in, is that there is no prescription. 879

What not a spiritual defamation. 944

Excommunicato capiendo in a cause for slander or defamation held well. 950

Sentence in a cause of marriage, conclusive evidence. 960, 961

No prohibition for strumpet bawd. 1100

Of the jurisdiction of the spiritual court as to clandestine marriages. 1057

Bounds of a church-yard not triable in the spiritual court. 1011

Prohibition to a suit for building a charity school in a church-yard. 1120

In what case the suppletory oath shall be admitted. 81

A curate may nominate a church-warden. 124

Bond taken by the spiritual court from an administrator *durante minore etate* with the will annexed for a due administration, held good. 113

Ejectment.

For *communia pastura*. 8

For mountain in *Ireland*. 7

Lies *de parte domus*. 60

Ejectment lies not for a tenement. 83

For *Alder Carr* in *Norfolk*. 100

For a beast-gate in *Suffolk*. 108

No new ejectment to be brought till costs paid of the first. 54

Proceedings stayed in error and a second ejectment, till the costs of the first paid. 55

Proceedings not staid till payment of costs in a former ejectment, unless there has been vexation. 681, 100

I N D E X

Proceedings staid till notice given where the lessors live. Page 681

Proceedings stayed in a second ejectment, &c. the lessors not being liable to the former costs. 1152

Infant lessor shall name a good plaintiff to be answerable. 694, 932

Proceedings on ejectment staid on bringing arrears of rent into court. 900

The court cannot stay proceedings in ejectment though the lessor is dead and his title at an end. 1056

Casual ejector cannot confess judgment. 531

Release of the plaintiff in ejectment or assignment of his death for error is a contempt. 899

Where judgment is obtained against the casual ejector, the party in possession may controvert the title in an action for the mesne profits. 960

Court will not consolidate declarations in ejectment. 1149

Declaration in ejectment not amendable. 1211

The term in ejectment enlarged without consent. 1272

Ejectment is a process of the court. 567

Rule that leaving the declaration at the house shall be good service. 575

No rule to defend *quoad* a right to perform divine service. 914

Leave to plead to the jurisdiction given in a country cause in the second term after delivery of the declaration being the issuable one. 1120

Landlord cannot be made defendant in ejectment in the room of tenant in possession, upon the ground that he is a material witness for the former. 632

He cannot be a witness, as being liable for the mesne profits. 1127

No relief against a tenant's refusing to appear and make defence in ejectment. 830

Landlord made defendant without his tenant may bring error and stay execution. 1241

Where there are two demises of different lands, judgment to recover his term in the singular number is sufficient. 835

How to lay the second demise in ejectment. Page 908

Judgment to recover his term though on demises of different lessors held good. 1180

Where the plaintiff loses his possession, in what cases he shall have a new execution. 831

Regular judgment in ejectment set aside, no trial being lost upon putting the plaintiff in as good a situation as he would have been. 975

The notice to appear must be on the first day in full term. 1049

Leaving beer in a cellar is keeping the possession. 1064

There must be an actual entry to avoid a fine, and the demise can not be laid on a day before the entry. 1086

An entry by a stranger without authority is good to take advantage of a condition, if it be assented to afterwards. 1128

Lessor of plaintiff may pay the costs to which of the defendants he pleases. 516

Election.

Where the presence of an officer is required, yet his consent is not necessary. 53

The right of adjourning a vestry is in the parish at large. 1045

A man sells goods or lays out money wrongfully, the owner may charge him as bailiff, or as a wrong-doer at his election. 860

An act of an agent cannot be affirmed as to part, and avoided as to the rest. 859

Elegit.

After a *nihil* returned as to the lands upon an *elegit*, there may be a *capias ad satisfaciendum*. 226

Where there are no lands the sheriff need not return an inquisition. 874

Entry.

There must be an actual entry to avoid a fine, and the demise cannot be laid on a day before the entry. P. 1086
See **Ejectment**, **Forcible entry**.

Equity.

A subsequent title which is both legal and equitable destroys a prior title in equity only. 240
See **Chancery**.

Error.

On what judgments Error lies.

Does not lie on refusing a prohibition. 391, 537
Error will not lie on the award of a peremptory *mandamus*. 536
Error lies not on allowing the return of a *mandamus*. 628
Error lies on the award to remand where the court refuses to bail. 536
If the plaintiff be nonsuit, and judgment against him for costs, error lies *in camera scaccarii*. 235
Where the judgment is against two, a writ of error *ad damnum* of one only will not lie. 606
Error *coram vobis* lies not after affirmance in the Exchequer Chamber. 690
After affirmance error *coram vobis* cannot be allowed without leave. 949
No writ of error *coram vobis* lies after affirmance. 975
Error does not lie in the Exchequer Chamber on an award of execution only. 1102

Writs of Error quashed.

Writ of error quashed by means of the defendant in error, to be without costs. 139
Writ of error quashed being by one defendant only of a judgment against two. 233

Costs on quashing writs of error are to be given in all cases. Page 606

If a writ of error be quashed for any other fault than variance, error *coram vobis* lies. 607

Will not quash error for being 29 years after judgment. 837

Writ of error quashed being returnable before judgment. 891

Judgment against the inhabitants of part of three parishes, and a writ of error of a judgment against the inhabitants of the three parishes, quashed. 1110

Where a writ of error is spent by the plaintiffs in error moving in arrest of judgment, he shall pay costs on quashing it. 834

Amendment of Writs of Error.

Error by two defendants where there were eleven others, the writ is amendable. 68

Writ of error amended without costs. 86

Amendment of writ of error by striking out a plaintiff. 89

The court may *ex officio* amend a writ of error. 90

Abatement of Error.

Where error abates by the act of the plaintiff in error, execution shall go. 880, 101

Superfedeas.

A writ of error supercedes the taking of a *capias ad satisfaciendum* in order to charge the bail. 8

Writ of error sued out before judgment is a *superfedeas*. 6

Plaintiff cannot call for the return of a *capias ad satisfaciendum* pending error. 11

Assignment of Errors.

In error from Ireland rules are given to assign errors, otherwise not. 1

Plea to the *scire facias quare executio non*,
set aside. Page 679

A rule must be given on the *scire facias*
quare executio non before a rule to assign
errors. 917

Where the plaintiff in error pleads to the
scire facias, there shall be execution if
it goes against him. 390

Assignment of errors set aside as vexa-
tious. 141

Errors assigned by attorney against the
crown. 443

On affidavit of the want of a warrant of
attorney, it may be assigned for error
on a record from *Ireland*. 545

No error to be assigned contrary to the
record. 684

Where two join in a writ of error, and
one will not assign errors, the court
will give the other time to summon
and sever. 783

Assigning for error the death of the
plaintiff in ejectment is a contempt.
899

Error in the act of the court may be as-
signed by the party who has advantage
by it. 973

Defendant in ejectment not allowed to
assign infancy in himself. 33

Matter assignable for error by the prin-
cipal, not assignable by the bail. 197

Matter omitted to be pleaded not as-
signable. *ib.*

In *miser cordia*, &c. in actions against
Peers is not error. 225

Judgment on indictment reversed for
errors in the award of the *venire*. 309

Entry of *capitatur*, where there should be
no *capitatur* nor *miser cordia*, aided by
verdict. 313

Appearance of infant by attorney not
amendable. 445

Leaving out *super se assumptis* is ill on
a judgment by default. 793

Where error is brought on a judgment
that the parol shall demur, the non-
age cannot be pleaded again. 861

The jury on an indictment must appear
to be sworn in the county. 901

Action tried in a court of inferior juris-
diction before a mayor who was not
interested, the judgment being given

by a subsequent one, who was; reversed
in *B. R.* on that account. Page 639

Error in a final judgment may be assign-
ed by the party who is benefited by it.
971

Unless what appears upon the record
warrants a *venire de novo* it would be
error to grant it. 1185

See *Sundays*.

Process in Error.

The *scire facias* in error must be returna-
ble as the original process was. 694

How the entry shall be where a release
of errors is found. 683

The court will take no notice of the re-
cital of a writ in a declaration, but will
require the writ itself to be produced.
225

Return of a *certiorari* that no writ *civi-*
tatis London is found, allowed. 309

The court may award a *certiorari* before
errors assigned. 440

In *nullo est erratum* a proper plea to an
error not assignable. 685

No second *certiorari* to reverse a judg-
ment. 765, 819

If there be a warrant of attorney any
time *pendente lite* it is sufficient 897,
526

Errors are not verified by a *certiorari teste*
before the writ of error. 819

A *certiorari* lies to affirm a judgment after
in nullo est erratum. 907

The recital of the writ may aid a defect
in the count. 1023

Judgment in Error.

Judgment reversed on motion without
putting it in the paper where the de-
fendant in error made default to a
scire feci. 1210

Judgment reversed upon motion. 127

On a release of errors pleaded, judgment
quod querens nil capiat. *ib.*

Judgment reversed without a rule to join
in error. 144

On demurrer to assignment of errors the
judgment is *quod affirmetur*. 439

Where a judgment for a defendant is re-
versed, the plaintiff shall only have
such

such costs as should have been given him in the court below. *Page 617*
 Where a judgment is distinct for damages with a *consideratum est etiam*, the judgment may be reversed in part and affirmed *pro residuo*. 808, 973
 Action for words and verdict for 10*s.* judgment for it and 13*l.* costs it must be reversed in *toto*, for this is a joint judgment and where the damages in this action are under 40*s.* so must the costs by 21 *Jac.* 1. c. 16. § 6.

934
 On reversal of a judgment in part, the court in *Ireland* may be commanded to award a writ of inquiry, &c. 973
 Upon pleading the statute of limitations, in error, the judgment is to bar the plaintiff of his writ. 1055
 Where an improper judgment is prayed in a plea to a writ of error, the proper judgment shall be given. *ib.*
 Costs in error where none in the original suit. 1084
 On affirming an interlocutory judgment of *B. R.* in *Ireland* on a writ of error there, the record must be remanded.

1258
 On *scire facias* against an executor judgment given for the plaintiff with costs, reversed as to the costs and affirmed as to the residue. 188
 In error from *C. B.* into *B. R.* if the judges are equally divided, judgment may be affirmed by consent of the plaintiff in error. 383

Bail in Error.

On error in action *sur bottomree* bond there must be bail. 476
 There must be new bail on a second writ of error. 527
 No bail in error of an outlawry till reversal. 951
 Bail required on a bond for paying 500*l.* being the sum mentioned in certain indentures. 959

Pleas to Errors assigned.

In *nullo est erratum*, admits a fact properly assignable for error; but where it is not so, then it is a demurrer in law. *Page 685*

Release, &c.

A release of errors may be given in the same deed with the warrant of attorney, if the judgment relates to a day before the date. 1215
 The court of Exchequer chamber may try a release. 821
 There is no instance of an adjournment upon a writ of error from *C. B.* to *B. R.* *Exchequer Chamber.* 383
B. R. does not send the record to the *or Exchequer Chamber.* 837
 Error to reverse a recovery is barred by twenty years, though the title of plaintiff in error did accrue within that time. 1257
 See *Amendment.*

Escape.

Escape warrant does not lie against a prisoner for a mere contempt. 99
 Superfeded because the party was intitled to a discharge. 401
 An escape is purged by a return, and the escape warrant cannot be executed afterwards. 423
 Attachment not to be granted for a voluntary escape. 531, 532
 Recaption must be before action brought. 873
 Action upon the case lies for the escape of an outlaw. 901
 Gaoler cannot retake for fees. 909
 In escape of a prisoner removed from another court, it is enough to shew the proceedings in that court. 951
 It must appear, that the commitment was of record. 1226
 Rescue, by any but common enemies, is no excuse for the escape of a prisoner brought out on *habeas corpus*, between judgment and execution. 429
 Husband

Husband and wife may join in an action of escape of one in execution at their suit on process of a court of equity.

Page 726

Essoin.

Essoin lies not on a *capias*; and the plaintiff may go on notwithstanding an irregular *non prof.* 1194

Estoppel.

A man covenants to pay the rent reserved by a former indenture, he is estopped to say no rent was reserved. 512

The tenant is not estopped by description of lands in the lease. 610

Where estoppel appears on the record it need not be replied. 818

An assignee of a lessor may take advantage of an estoppel in covenant for his rent. *ibid.*

Evidence.

All of the commissioners for stating the debts of the army conclusive evidence. 481

Sentence of spiritual court in a cause of marriage, conclusive evidence. 960, 961

Affidavit of the deceased husband read in proof of the marriage. 35

What a witness swore who is since dead, evidence of a pedigree. 162

The declaration of a dying man against his murderers is reduced to writing, and not produced; the same declaration made at another time may be given in evidence. 500

But a copy of this writing cannot although the original was not signed by the deponent through weakness. *ib.*

Record of acquittal on an indictment, no evidence in an appeal for murder. 856

The Court will not make a rule for the officer in whose custody it is to attend upon such an occasion. 856

Cannot read deposition of witness examined fifty years before, without some account of his death. *Page 920*

An entry in an attorney's debt-book read after his death. 1129

In a question about the sanity of a testator, the coroner's inquest finding him *lunatick* not proper evidence. 68

Corporation books must appear to be kept by the proper officer, or be proved to have been regularly kept. 93

A survey taken by one of the parties not admitted. 95

On an indictment of overseers for neglect, the appointment must be produced. 101

Rule on a justice of peace to cause an examination to be produced. 126

Postea evidence of a trial, but not of a verdict. 162

Heralds books and minutes of a visitation, evidence of a pedigree. 162

A verdict on a voidable trial read. 308

Copy of an old letter in the corporation chest, not evidence. 401

In an action for a malicious prosecution an advertisement put into the papers, by defendant, of the finding of the indictment, may be given in evidence, although an information has been granted for as a libel. 691

A libel read, on confession of the defendant that he was the author, small variations excepted. 416

Rule for an attachment on a copy of an award, and affidavit that the original was lost by robbery of the mail. 526

In an action against a justice he must shew the proceedings. 711

The indorsement of interest being paid within twenty years shall be given in evidence, though under the hand of the obligee. 826

Indorsement made by obligee on an old bond after the presumption had taken places, not admitted in evidence. 826

The day-book from whence the parish register is made up not allowed in a question of legitimacy. 1073

A juug-

- A judgment of ouster against the magistrates before whom the defendants were sworn, proper evidence. *P.* 1109
- Copy of a record may be read at a trial for malicious prosecution, though not ordered by the court. 1122
- Bills of parcels with receipt, proof of buying goods beyond sea. 1127
- A special verdict between other parties, not received in evidence of a pedigree. 1151
- Affidavits sworn before a judge in *Ireland* read in *England*. 545
- Parol evidence not admitted to fix the construction of a will. 1261
- Parol evidence may be given of the condition of records and the manner of keeping them, but not of the matter of them. 210
- Where an award has general words sufficient to take in all matters, it shall not be admitted to shew that any thing was not taken into consideration. 647
- No parol evidence to explain a deposition. 794
- Rule to inspect the books of the commissioners for stating the debts of the army. 304
- Original poll-book not ordered to be produced. 307
- East-India* company not obliged to produce book of letters. 646, 717
- No rule granted to inspect a corporation's private books. 717
- Leave given to inspect books in which boundaries are entered. 954
- No access to books of Post-Office in collateral actions. 1005
- Rule made for a plaintiff to produce his books. 1130
- No rule to inspect books on claim of right to hold a leet. 1203
- No inspection of books by a prosecutor of a misdemeanor. 1210
- Books of a corporation may be inspected on disputes between the members, to which the corporation are no parties. 1223
- Access granted to books of the court of conscience. 1242
- Wife *de facto* allowed to give evidence of the nullity of her marriage, though bigamy, in support of her action. *P.* 79
- What the guardian said admitted as evidence against the infant. 548
- In a trial of a customary right to a fine, it was allowed as evidence that other tenants had submitted. 659
- Wife owning receipt of money, no evidence against the husband. 1094
- Customs of other manors given in evidence to determine the nature of tenant-right estates. 659
- Customs in other manors or archdeacons' not evidence. 957
- Claiming goods as a deadand not admitted on the general issue. 60
- A smaller sum in satisfaction of principal and interest allowed in evidence. 69
- The truth of words cannot be given in evidence on Not guilty. 1200
- Fraud cannot be gone into on a general replication of *non assignavit*. 112
- A ship never heard of is presumed to be foundered at sea. 119
- Matter laid as a circumstance need not be proved. 72
- See *Issue General*.—*Witness*.
- Exceptions.**
- No bill of exceptions lies on summary proceedings about settlements. 100
- Excommunicato capiendo.**
- Superseded.
- Must set forth the species of the fact.
- Held good from precedents, notwithstanding improprieties in the form.
- The rules may be allowed to a prisoner on *excommunicato capiendo*.
- In *causa difamationis sive convicii*, uncertain.
- The *significavit* must set forth the civil cause.

I N D E X.

1303

Where the return is lost by exceptions taken in B. R. a second writ may be obtained in Chancery. *Page* 1189
 It is good though it states the cause to be on an appeal and complaint of nullity. 1189
 Though the judge is made a party and condemned in costs. 1189

Execution.

taken out within the year, may be continued. 100
capias ad satisfaciendum may be had after an *elegit* executed only on goods. 226
 Not to be had without *scire facias*, where the plaintiff has been delayed a year by an injunction. 301
 After an extent and a partial eviction, the conusee can have a re-extent in another county. 461
 Where extents are to be executed in different counties, they must be prayed at the same time. 462
 Contempt to take out two executions, where only one satisfaction is due. 515
 Extent for the King's debt cannot be antedated, but must bear *teste* at the day it issues though it be out of term. 749

Executor.

A warrant of one executor is not sufficient to enter judgment against the others. 20
 An executor is presumed to take a term as executor, and not as devisee, without proof of his assent. 70
 A bill to discover assets, a court of equity will decree payment. 403
 Erroneous judgment may be pleaded. 407
 A *devastavit* be returned, there needs no allegation of a conversion. 440
 Where there is a legacy to the executor for his trouble, the surplus shall be distributed. 568
 Where executor must declare as executor he shall pay no costs. 682

In action by executor of executor, it must be shewn that the first executor proved the will, but the omission is cured by a verdict. *Page* 716
 Executor cannot plead judgments to the *scire facias*, which he might have pleaded to the action. 732
 Administrator discontinues without costs. 871

Where a prosecutor is liable to pay costs for not going on to trial, if the defendant dies his executor shall not have them. 874

Where a bond is forfeited in the lifetime of the testator, the penalty is the legal debt, and on the issue what is due must cover so much assets; but on a bond where the day of payment is not come, the assets only can be covered for the sum in the condition. 1028

An administration may be pleaded *pro darrein continuance*, to justify a retainer. 1106

An executor shall pay costs on a nonsuit in an action for a duty accruing to himself. 1106

A demand as executrix is within a general submission to an award. 1144

If the probate be lost, executor may declare on an exemplification of it. 412

Executor may have action against the sheriff upon 8 *Ann. c. 17.* for removing a tenant's goods in the lifetime of the testator without paying a year's rent. 212

Executor cannot add a count in his own right. 1271

See *Distribution*.

Exhibits.

No inspecting exhibits before hearing. 764

Exposition of words.

The writing crosses the face of a bank-note is properly called an indorsement. 18

To pay on such a day next, in a note refers to the date. 394

Barratry

Barratry in a policy the same as fraud.

Page 581

Et taken disjunctively after a verdict.

594

Reservations or powers at the end of a sentence refer to all the members of the sentence.

965

Quamplurimi does not import the greater part.

1097

Curia de banco nostro, in a writ, means the King's Bench.

302

Indentura facta inter, &c. imports sealing by both parties.

512

Et taken disjunctively.

594

Extent.

An extent cannot be antedated, but must bear *teste* at the day it issues, though out of term, for it issues out of the equity side of the exchequer which is always open.

749

If tested before the day it issues will be superseded on motion as irregular.

749

Quere, Whether it can be taken advantage of by plea being an averment contrary to the record.

749

A commission of bankruptcy and assignment prior to the teste of the extent are a good bar to it.

749

Vide Dyer, Execution, Traverse.

Extinguishment.

Though a bond is taken for a simple contract debt, yet if it is after an act of bankruptcy, the simple contract is not extinguished.

1042

Extortion.

Judge of a bishop's court convicted of extortion for compelling probate of a will proved in the prerogative court.

74

Judices of peace have consuance of it.

75

Factor.

A Factor cannot pawn. Page 1178

Where goods are sold by a factor at his own risque, the vendee is not answerable to the owner.

1182

False tokens.

The false tokens must be specified in an indictment.

1127

Fees.

Fees to the usher of the black rod recovered.

747

Officer must obey a writ, though fees unpaid.

812

Process must be obeyed though the fees are not tendered.

1262

Felony.

The stealing a commission to settle boundaries is not larceny.

1131

One indicted as of a felony and found guilty of a misdemeanour discharged.

1157

Fine.

Devise to *A.* and *B.* for their lives equally to be divided, and after the deceases to their heirs male of the bodies, equally to be divided, and either of them die without issue, the to the survivor and his heirs male. *A.* and *B.* make partition, and levies a fine and suffers a recovery, and dies without issue. The entry of is taken away, and no title accrues survivorship.

See Recovery.

There must be an actual entry to avoid a fine, and the demise cannot be on a day before the entry.

10

Forcible Entry.

Where a conviction is quashed, court must award restitution.

I N D E X

The justices who make the conviction,
must set the fine. Page 794

Foreign attachment.

How to be pleaded. 641

Foreign courts.

Discharge by a foreign jurisdiction from
a bill of exchange drawn there, a
good defence. 733

Sentence of a foreign admiralty, con-
demning a ship as insufficient, not to
be read on trial of an issue joined on
that fact. 1078

No special bail on a recovery in a fo-
reign court. 1243

Forfeiture.

No relief against a voluntary forfeiture
of copyhold. 447

But there is a difference where the for-
feiture is intended merely as a security
for a duty, there equity will relieve. 453

Making a lease without licence from the
lord is a forfeiture of the copyhold. 447

Quere, Whether working a quarry there
which has been first opened in a free-
hold or topping trees or grubbing up
hedges are, 447

The penalty on the gaming act must
be sued for after a conviction. 1048

See Copyhold.

Forgery.

Altering a writing cross the face of a
bank-note, is altering an indorsement
within the statute. 18

Altering an instrument is forging it. 19

Any whose deed is forged no witness. 728

Forging a receipt for goods which de-
fendant was bound to deliver is a for-
gery and punishable at common law. 747

Vol. II.

If the information for it charges, "that
A existens onerabilis to deliver, &c. did
with intent to defraud, forge an in-
dorsement, &c. it is sufficient, for it is
not necessary to shew an actual preju-
dice, a possibility is enough. Page 747

A forgery with intent to charge, is
within 5 *Eliz.* though of a deed im-
proper for the purpose. 901

Publishing a false affidavit knowingly
is an offense at Common-law. 1144

Forma pauperis. *See* Pauper.

Frauds and Statute of Frauds.

Promise of marriage not within the
statute. 34

What writing is necessary to bring a case
out of the statute of frauds and per-
juries. 236

A letter referring to a verbal promise is
sufficient to take the case out of the
statute of frauds. 236

A letter to a third person that he has
agreed to dispose of his land, does
not bring the agreement out of the
statute. 426

Contract for goods bespoke and made,
not within the statute. 506

Statute of frauds not pleadable where
the agreement is executed in part. 783

Promise to pay the debt of another in
consideration of forbearance is within
the statute of frauds. 873

A remainder inserted in a settlement by
fraud, set aside in equity. 144

An assignee of a lease may assign over
and discharge himself, and it is no
fraud. 1221

Game.

CONVICTION of keeping a dog
to destroy game, sufficient. 496

Indictment lies not for killing a hare. 679

3 A

Conviction

I N D E X.

Conviction on the game act need not aver that the party did unlawfully hunt, &c. *Page 711*

The bare keeping a gun is no cause of conviction. 1098

Hound, not within 5 *Ann. c. 14.* 1126

Gaming.

A plea of the statute of gaming must mention the particular game. 495

The innocent indorsee of a gaming note can maintain no action against the drawer. 1155

But he may sue the indorser upon his indorsement. *Ib.*

Horse races are within the acts against gaming. 1159

A parol loan of money to play with is not void. 1249

The loser of money at play sues for it upon the statute, he shall have special bail. 1079

The penalty on the gaming act must be sued for after conviction. 1048

See *Forfeiture.*

General issue. See *Issue.*

Gift.

A parol gift without some act of delivery will not alter the property. 955

But delivery of the key of his rooms by a lodger to the wife of the owner of the house, upon his going out of town is sufficient possession to substantiate a gift of the furniture, &c. contained therein. *ibid.*

Guardian.

Messenger sent by the Chancery to keep an infant at college. 168

On a *habeas corpus* the court will not determine the right of guardianship, but set the child at liberty. 982

If an infant refuses to name a guardian to appear by, the plaintiff may do it for him. 1076

Gunpowder.

Keeping gunpowder in great quantities is a nuisance. *Page 1165*

Habeas Corpus.

ON a *habeas corpus* the court will make no order as to the party, but to see he is under no illegal restraint. 444

Child brought up by *habeas corpus* delivered to guardian. 579

On a *habeas corpus* the court will not determine the right of guardianship, but set the child at liberty. 982

A prisoner committed by a secretary of state, must make his prayer the next term; and he has not another term after he is committed by rule of court. 142

Offences in *Scotland* not within the *habeas corpus* act. 308

Justices of peace in *England* may commit a person offending against the *Irish* law in order to his being sent over. 841

One charged with a murder in *Portugal* not bailed. *ibid.*

Attachment granted for not returning without a rule to return. 911

Action lies against a constable for not delivering a copy of the commitment. 16

Prisoner not to be turned over till the officer is paid his charges. 30

Officer must obey a writ, though fees unpaid. 814, 126

Error lies on the award to remain where the court refuses to bail. 53

That he had delivered the woman to his husband, knows not where she is, and cannot produce her, is a good return to an *habeas corpus*. 9

I N D E X.

Hawkers and Pedlars.

There must be a formal conviction on their statute, though the act does not mention it. Page 127

Heir.

An heir hath lands by hereditary descent, yet he shall not be liable for the debt of his ancestor any further than to the value of the lands descended. 665

Executor, and not the heir, shall have hangings, &c. 1141

Tenant in tail by purchase with the reversion in fee *ex parte materna* suffers a common recovery; the old use is gone, and it descends to his right heir. 1179

See Condition, Devise.

Heralds.

Clarencieux is part of the name of the officer. 850

Highways.

Communis strata a proper word. 44
The *termini* of a highway not necessary to be set out, in case of a nuisance. 44

On Not guilty to an indictment for not repairing, the prosecutor must prove it an highway, and to lie within the parish. 181

A man charged to repair may throw it on the parish by the general issue. 184

Ratione tenuræ sufficient without *sue*. 187

Mandamus to reimburse a surveyor of highways. 211

Order for a rate for the highways must adjudge the statute labour insufficient. 315

Bad if it charges the occupiers of land only. 315

Where the original of a way is accounted for, the prescription is destroyed. 509

Certiorari's relating to highways are taken away by 3 & 4 W. & M. though to remove orders made on a subsequent law. Page 944

By setting out a highway the owner does not part with the property of the soil. 1004

Certiorari pro rege lies in case of highways, though no affidavit or recognition. 1209

House of correction.

The justices have power to commit idle and disorderly persons to hard labour, and they shall not be bailed. 882

Hue and cry.

The hundred is liable for a robbery on a Sunday, where the party was going to church. 406

What is a good notice within 8 Geo. 2. c. 16. in an action against the hundred. 1170

The plaintiff must make oath whether he knows the offenders; and oath that he suspects *A.* and *B.* is insufficient. 1247

Jeofails.

THE statutes of jeofails extend to the civil suits of the crown. 62

Want of alledging attornment, though aided by verdict, not aided by judgment by default. 79

Name of plaintiff for defendant in the joining issue aided. 551

Inconsistent reference to a record ill on special demurrer. 611

Want of a *similiter* not aided or amendable. 641

In action by executor of executor, it must be shewn that the first executor proved the will; but the omission is cured by a verdict. 716

Want of writ of inquiry is aided. 878

The statutes only help such things in judgments by default, as would be helped by statute after a verdict. 935

Want of alleging a presentation in *quare impedit* cured by a verdict. Page 1011
 On 16 & 17 Car. 2. an actual amendment is not requisite. 313, 1011
 See Amendment, Error.

Jews.

Allowed to be covered when they swear. 821
 Not intitled to freedom, where there is custom to swear on the New Testament. 1112
De scriptis decipiebant is too general. 8
 The abjuration oath altered for the Jews. 1114

Indictment.

Quod male et negligenter se gessit, quashed for being too general. 2
De scriptis decipiebant is too general. 8
Calumniatrix et pacis perturbatrix, &c. too general. 849
 For selling divers quantities of beer is too general. 497
 For obstructing a justice of peace, must shew the particular fact. 699
 Intent to defraud, not indictable. 856
 Judgment arrested for the generality of the charge in an information. 999
 None but a barretor or scold can be indicted by general words. 1246
 Indictment against a scold should be laid *ad commune nocumentum*. 1247
 Whether *ubi bene sciebant* is a sufficient allegation of a fact and notice. 75
Sciens in an indictment is a good averment. 904
 In an indictment for a rescue, it must appear for what the party was committed to the house of correction. 1226
 Indictment laying a nuisance to be committed "near the highway, and also near several dwelling houses, &c." is well enough. 686
Fabricavit denotes forgery, and evidence of altering or erasing will be good. 19
Vi et armis is implied in a riot. 834
Levarit vel levari causavit, ill. 900
 Indictment for trespass before justices of the peace quashed for want of *nec non ad diversas felonias*, &c. 442
 Quashed, the caption being *ad festum Epiphaniæ*. 698

An indictment found at an adjourned sessions must shew in the caption when the sessions began. Page 865
 For using a trade used in Great Britain (instead of England) at the time of the statute 5 Eliz. quashed. 552
 Will not lie for secreting a woman with child from the parish. 612
 Lies not for conspiring to marry a parish pauper. 797
 Indictment lies for not taking the office of constable. 920
 Not taking upon him the office of overseer of the poor, is indictable. 1146
 Indictment for bringing a bastard born at A. into the parish of B. with intent to charge B. quashed, for a bastard is chargeable only where born. 644
 Indictment of overseers for not paying over, not quashed. 1268
 Indictment for not receiving an apprentice, must shew the binding to be according to the statute. 1268
 Indictment for not executing a warrant, not quashable. 1211
 Cannot join several in one indictment for perjury. 921
 Cannot indict two persons together for distinct offences. 623
 Indictment lies not for killing a hare. 679
 Lies not against a miller, for detaining part of the corn. 793
 Indictment for usury lies not barely for a corrupt agreement. 816
 The court will oblige a prosecutor in some cases to pay costs on quashing an indictment. 946
 The court cannot strike unnecessary counts out of an indictment, being the finding of the grand jury. 1026
 But they ought to be drawn by the clerks in the Crown Office, that the court may punish them for vexation. 1023
 If no indictment is directed by a statute, a penalty to the king must be sued for as a debt. 828
 Damages to a third person not named in the record, or matter which constitutes an offence of itself, whether to be considered in setting the fine. 139

I N D E X.

1311

Assault on two people cannot be joined
in the same indictment. Page 870
See **Information.**

Infant.

Declares uses of a fine to be levied at
full age, he may declare other uses. 94

Necessaries for his wife, necessaries for
him. 168

Covenant of an infant to make a join-
ture, decreed. 604

Bound by promise of payment at full
age. 690

Where there are two executors, and one
under age, they may sue, but cannot
be sued, by attorney. 784

But one may sue by attorney, and the
other by guardian. 784

Error in *B. R.* in *Ireland* to reverse a
common recovery suffered in *C. B.*
there; the tenant pleaded that he is in
by descent, is an infant, and prays
that the parol may demur, he has
judgment accordingly there, which is
affirmed in *B. R.* here. 861

He may plead this after an imparlance,
and this plea will be good, although
it does not state the age of the infant. 862

Infant may sue on a contract of marriage
with a person of full age. 937

The different force of infants' contracts. 939

An infant cannot be charged for goods
delivered to trade with. 1083

A replication of necessaries must aver
the goods to be necessary for the in-
fant. 1101

Where an infant was plaintiff and in
execution for costs, the court would
not discharge him on motion. 1217

Pays no costs in equity on a bill filed by
prochein amy. 708

General admission of a *prochein amy* is
sufficient. 304

Declaration of the guardian admitted in
evidence against the infant. 548

Infant brought up by *babeas corpus*,
and delivered to the guardian. 579

At what age an infant may be received
to give evidence. Page 700

If an infant defendant will not name a
guardian, the court will appoint one. 1076

Inferior Courts.

Cannot grant a new trial. 113, 392

Have been allowed jurisdiction in cases
similar to those where they have ju-
risdiction. 256

May set aside proceedings for irregu-
larity or surprise. 392

May set aside a verdict for irregularity. 499

The King's Bench cannot receive a fine
set by an inferior court. 736

B. R. cannot set a fine on a conviction
by justices of the peace. 794

The items in a stated account need not
be laid *infra jurisdictionem.* 827

It is not a good custom, for an inferior
court to award a *tales de circumstanti-*
bus. 841

The King's Bench will not punish by
attachment a contempt of an inferior
court. 567

Judgment reversed, because the mayor
appeared to be interested. 639

Information.

Not granted for perjury in the oath a-
gainst simony, before conviction of
the simony. 70

For a public offence it may be granted
on the application of a private prose-
cutor. 126

Not to be quashed on motion. 185

Against an officer of the *African* com-
pany for detaining a person listed by
them. 404

Not granted for a libel, where the con-
tents are true. 498

Not amendable in the *venue.* 911

Informations are local, and not to be
prosecuted for facts done at sea. 918

Information *qui tam* not to be quashed on
motion. 953

Judgment arrested for the generality of
the charge in an information. 999

I N D E X.

The statute for costs on informations extends to cases of *quo warranto*. Page 1042
 Informations quashed by consent. 1072
 Not quashable on motion. 1103
 Information granted for taking away a young woman from her guardian and marrying her. 1107
 No information for not collecting brief money. 1130
 If the defendant is acquitted against evidence, yet if there is no certificate he shall have costs. 1131
 Not granted against a justice for refusing an informer's oath against a waggoner. 1181
 No information against a dissenter for refusing the office of sheriff of London. 1193
B. R. will not grant information for usury, after the suit is lapsed to the crown. 1234
 See *Quo warranto*.

Injunction.

Perpetual injunction decreed after two trials at bar. 404

Inns.

Innkeepers cannot sell the guest's horse for keeping, except in London. 556

Inquiry.

There must be the same notice of executing a *scire fieri* inquiry as a common writ of inquiry. 235, 623
 Set aside for too small damages where the plaintiff was unprepared. 515, 425, 1259
 Execution of a writ of inquiry may be adjourned after it is entered upon. 853
 See Amendment, Damages, Sunday, Trial.

Inquisition.

The traverser of an inquisition for the King is to be considered as a defend-

ant, and the prosecutor may carry down the record. Page 1208

Insurance.

Barratry in a policy the same as fraud. 581
 Where salvage falls short of the freight, it is a total loss. 1065
 Where the master deviates for the benefit of his owners, it is not barratry, though it may be a breach of contract. 1173
 Concealing an information of danger avoids a policy, though the loss does not happen by such danger. 1183
 A ship never heard of is presumed to be foundered at sea. 1199
 Goods lost after the owner has taken them from the ship into a lighter, is no charge on the insurer. 1236
 Insurer is liable where a ship goes back to perform quarantine. 1243
 Policy on any ship the plaintiff should sail in from *Virginia* to London, not transferred to another ship that the plaintiff goes on board of in the voyage. 1248
 An intention to deviate does not discharge the underwriter. 1249
 On a policy interest or no interest, a recapture after being in an enemy's port will not avail the insurer. 1250
 A ship that sails with the convoy, though hindered by the weather from taking sailing orders, departs with convoy. 1251
 The freight a ship would earn is no part of the damages by her loss, unless part of the goods are on board. 1255
 The mariners force the master to return that is no deviation nor barratry. 1260
 A ship warranted to depart with convoy is insured during her way to the general rendezvous. 1260

Joint and several.

Where the process is against two on joint cause of action, and one only appears, the other must be outlawed.

In action against one obligor upon a joint bond, the objection must be pleaded in abatement. Page 503

Officer joining in plea with a party who is not justifiable shall fail. 509

Where the covenant is joint and several, in an action against one only, the breach may be assigned in the neglect of both. 553

One defendant overthrows the action after judgment by default against the other, it shall be stayed as to both. 610

Assault on two people cannot be joined in the same indictment. 870

The damages cannot be given separately against several defendants in case. 910

Cannot join several in one indictment for perjury. 921

If one named in the indenture does not seal, he must be excluded by an averment. 1146

A covenantee must be a plaintiff though he never sealed. ibid.

Actions of trespass against several defendants, not to be joined by the court. 420

See *Authozity. Abatement.*

Jointenants and Tenants in common.

Remainder on an estate-tail to another tenant in common barred by recovery. 12

One part-owner brings trespass without his companion, it must be pleaded in abatement. 820

Journeys accounts.

Within what time an executor must pursue an action begun by his testator. 907

Ireland.

Swavits sworn before a Judge in Ireland read in England. 545

Justices of peace in England may commit a person offending against the

Irish law, in order to his being sent over. Page 848

On reversal of a judgment in part, the court in *Ireland* may be commanded to award a writ of inquiry, &c. 973

See *Error.*

Issue.

Where it was discovered previous to the trial, that the issue was "*et præd*" the defendant, instead of the plaintiff, "*fimiliter*" the C. J. thought he had no commission to try any issue, and dismissed the jury. 1117

Issue upon the usage under a charter of 36 *Eliz.* is an immaterial issue, for the right in question must stand or fall by the charter itself. 395

Trespass for breaking and entering *A*'s. close; plea that the locus in quo was *B*'s. proper lands; replication that it was the estate of inheritance and proper lands of *A*. and not the proper land of *B*. after verdict for *A*. held that the informality of this issue was cured. 973

That a grant (not the user) is prejudicial, good. 43

There can be no issue offered that is contrary to the record. 735

An apt issue may be joined, though there is not an exact affirmative and negative. 1177

Issue general.

See *Pleading, division, general issue.*

Claiming goods as a deodand not admitted in evidence on the general issue. 61

They who are not chargeable to repair bridges of common right, may discharge themselves upon Not guilty. 180

Usurious contract good evidence on *non assumpsit*. 498

In replevin, on *non cepit*, it is good evidence for the defendant, that the goods were taken in another place. 507

Non assumpsit a good plea to an action against a carrier. Page 574

A former recovery not to be given in evidence on *nil debet* in a *qui tam*. 701

Nil debet not pleadable to debt on articles for not paying for stock. 778

In case for beating a horse and not guilty pleaded, defendant may justify in evidence. 872

To a declaration on promise to the assignee, *non assumpsit* to the bankrupt is an ill plea. 919

Lunacy may be given in evidence on *non est factum*. 1104

In capital cases the joinder of issue need not appear upon the record. 775

Judgment.

The warrant of one executor will not justify the entering a judgment against all. 20

Presence of an attorney of another court, sufficient to authorise a warrant to confess judgment. 530

The court will not give leave to enter up a judgment of twenty years standing *nunc pro tunc*. 639

Cannot enter judgment on warrant of attorney after plaintiff's death. 718

Judgment may be entered on a warrant of attorney after the death of the party. 882

No warrant of attorney to confess a judgment from a prisoner good, but where there is an attorney *pro def.* present. 902

Judgment entered upon an old warrant, where the defendant was dead some hours before the rule was moved for, not set aside. 1081

A release of errors may be given in the same deed with the warrant of attorney, if the judgment relates to a day before the date. 1215

One in execution may confess a new judgment without the presence of an attorney. 1245

A warrant to confess judgment given by a prisoner in Ireland is subject to

the rule requiring an attorney's presence. Page 1247

Judgment at the suit of executors set aside, because by relation it was in testator's life-time. 1121

May be given on the plea where it amounts to a confession, notwithstanding the pleading over. 395

No moving in arrest of judgment after judgment on demurrer. 423

May be entered *nunc pro tunc*, where the party dies pending the advising of the court. 427, 917

Videtur curia is no essential part of the judgment. 449

Where the defendant is found not guilty as to part, there must be a judgment for him as to that. 726

Where an executrix pleads no assets *ultra* the penalties of three bonds and the jury by special verdict find assets in one entire sum less than the amount of the whole, and the court are of opinion that as to two of the bonds, the penalties are to be considered as the debt, but that the third being unforfeited, shall only be held, to cover the sum really due upon it; they may deduct such penalties and sum due with interest, out of the assets so found and give judgment for the plaintiff, to recover the remainder. 1021

Regular judgment set aside, where the plaintiff is not prejudiced. 87

Regular judgments not to be set aside but in order to give the defendant an opportunity of pleading to the merits. 124

Party may move in arrest any time before judgment signed. 84

Where the plea confesses the action and does not sufficiently avoid it, judgment shall be given on the confession, without regard to a verdict. 87

Consideratur is as well as *conf. est.* 87

On the gaming act, or for recusancy the judgment is, *quod convictus* 102

Where an improper judgment is pronounced on a writ of error, the proper judgment shall be given. 107

After two *nichils* the court will relieve on motion, if the defendant comes in reasonable time. Page 1075

A justice of peace convict of a misdemeanor in his office obliged to appear personally at praying judgment. 1088

Debt lies not in *Ireland* on a judgment in *England*. 1090

If there be a general indictment for felony, and a special verdict is found in which the facts do not amount to felony, but prove the person to be guilty of a great misdemeanor judgment cannot be given against him, for this trespass. 1133

See **Error**. Title *Judgment in Error*.

Judges. See **Justices of both benches**.

Juries.

Rule for a good jury refused to the defendants in an action against justices. 265

Though the lessor in ejectment is a Peer, there need be no knight returned on the jury. 1023

Desiring a juror to appear, is no cause to set aside the verdict. 643

One challenged, sworn on the tales, ill. 640

Cause suffered to remain for want of jurors though twelve sworn where plaintiff's counsel refused to pray a tales. 707

Judgment arrested because *ad tunc et ibidem* left out as to the swearing of the jury. 901

See **Challenge**, **Prerogative**.

Justices of both benches.

One of the King's Justices, does not import a Judge of *B. R.* 1226

B. R. will not take judicial notice, who are the Justices of the Common-Pleas. 1080

Justices of Peace.

Justices of peace may supersede their own order *quia improvide emanavit*. Page 6

In justices' orders for paying wages, it must appear that the service was relating to husbandry. 8

Order to pay money to a poor person must mention him to be poor and impotent. 10

A justice without whom the sessions cannot be held, is liable to an information for a voluntary absence. 21

Justices may commit for a contempt where words are spoken in his presence reflecting upon him, he being in the execution of his office. 421

Indictments quashed for want of *nec non ad diversas felonias, &c.* 442

If a justice convicts without summons, there shall go an information. 678

Trespass and false imprisonment lies against a justice for committing upon a conviction for destroying game where there was no attempt to distrain first. 710

Justices of peace cannot commit one in execution in *B. R.* to the county gaol. 818

Justices of peace in *England* may commit a person offending against the *Irish* law, in order to his being sent over. 848

Justices may order payment of wages by indulgence. 1002

Justice's warrant, where he has no power to grant one, will not justify the officer. ibid.

Where a city has justices with an exclusive clause, the justices of the county cannot act in matters of excise. 1154

A justice could not join in removing a pauper from his own parish. 1173

The sessions of particular liberties have the determination of appeals about the poor, and not the county sessions. 1222

The sessions cannot take indictments of new created offences, unless the jurisdiction is expressly granted. 1256

When

When the sessions is discontinued, a subsequent session cannot resume the appeals. Page 1263

See **Constitutions, Orders.**

Justification.

Probable cause of seizure not a justification to a custom-house officer. 820

A justification under a returnable process is ill, without shewing a return of it. 1184

Where the party and the officer join in a justification which is ill as to one of them, judgment shall be against both. 1184

See **Trespass.**

King. See **Debt to the King, &c.**

Labourers.

ORDERS for payment of wages must set forth, that the service related to husbandry. 8

Justices may order payment of wages by indulgence. 1002

Latitat.

A *latitat* may be pleaded without alleging a bill of *Middlesex*. 550

Leases.

Lessee may make an under-lease for the whole term. 405

Alleging the entry of the lessee prior to the commencement of the term will not vitiate the demand of rent. 550

Leases by parol, for less than 3 years from the making; to commence at a future day are not within the statute of frauds. 651

Conditional surrender of a prebendary's lease, good to warrant a renewal. 1201

An assignee of a lease may assign over, and discharge himself, and it is no fraud. Page 1221

Leet. See **Whorery.**

Legacy.

Legacy to a child discharged by a provision subsequent to the will. 233

If a legacy be given payable at 21. with interest in the mean time, and the infant dies, his representative may sue for it immediately. 238

Revoked by payment of a portion. 235

A. by will directs that the remainder of his real and personal estate should be equally divided among his six relations *A. B. &c.* share and share alike, and makes them his executors. A. dies in the testator's life-time, his legacy lapses and his share of the personalty, must go, according to the statute of distributions. 820

Lapsed share of the residue decreed to the executor. 905

A sum bequeathed out of a debt must be paid, though the debt is recovered by the testator; otherwise of a bequest of the debt itself. 820

Donatio causa mortis not suable in spiritual court. 777

Libels.

Information for granting a licence to a Peer to keep an alehouse. 412

An obscene book is punishable as a libel. 780

Conviction for a libel against Christianity. 830

Action for a libel discrediting the plaintiff's skill in his trade. 890

Judgment arrested, because libel not laid to be *de et concernen'* the plaintiff. 930

Where the contents of a libel are true the court will not grant an information. 490

I N D E X.

Limitations.

The statute of limitations runs, notwithstanding a bankruptcy. Page 556

An *indebitatus assumpsit* in an inferior court may save the statute of limitations on a promissory note. 719

Latitas prevents the statute of limitations, without a bill of *Middlesex*. 550, 736

The statute of limitations will not run against action on bill of exchange where plaintiff is beyond sea. 836

An executrix sues upon a promissory note to her testator, and dies before judgment, the 6 years from the cause of action having expired previous to her death, but subsequent to the commencement of the action. Her executor brings a new action within 4 years after the death of the executrix and the statute of limitations being pleaded, the court held the plaintiff barred and that he ought to have commenced his action, within a year after her death. 907

Error to reverse a recovery is barred by twenty years, though the title of plaintiff in error accrued within that time. 1257

Statute of limitations replied to a set off. 1271

Ejectment for mines, possession of the manor is no evidence to avoid the statute of limitations. 1142

London.

The child of a freeman of London when of age may in consideration of a present fortune bar herself of her customary part. 947

Part cannot take notice of the customs of London, unless found. 1187

By-law to confine brewers to certain hours for carrying out drink, good. 1085

Custom in London that persons intitled to their freedom shall take the oath of a freeman at the chamberlains' court on the new testament is good. 1112

And it is not unreasonable that the oath should be required to be taken prior to the admission. Page 1112

By-law to regulate the corn porters in London. 462

By-law obliging joiners to be free of the joiners' company. 675

Marriage agreement that the husband shall take up his freedom, binds the distribution of his effects. 455

Children of freemen may release their orphanage part. 947

The court will take notice that London, and the city of London, are the same. 309

Custom of London to cast whores, taken notice of without affidavit. 188

Apprentices inrolled before the chamberlain may be discharged by the justices where they live. 663

See *Mandamus*—Prescription.

Lunacy.

Lunacy may be given in evidence on *non est factum*. 1164

The traverser of an inquisition of lunacy is in nature of a defendant, and the prosecutor may carry the record to trial. 1208

Return of lunacy to *babeas corpus* by a physician. 915

Malicious Prosecution. See *Titton* Sur case.

Mandamus.

THE rise of writs of *mandamus*. 540

Mandamus to proceed to election where a clause for holding over. 555

Mandamus may be granted to go to an election, though there is a mayor *de facto*, if he have no colour of right. 1003

Granted to go to an election, notwithstanding an election *de facto*, which there

I N D E X

- there was good reason to think void. Page 1157
- Granted to elect officers who are necessary constituent parts of the corporation though not the head of it, where there were wrongful officers in possession. 1180
- Granted peremptory on the reversal of a judgment for the defendant. 697
- Mandamus* for a prebend. 1082
- To admit a prebendary. 159
- Lies for a chaplain where there is no visitor. 797
- To a University, to restore to degrees 557
- To restore a schoolmaster. 58
- For a parish clerk, sexton, scavenger. 59
- To swear an ale-taster. 608
- To swear in a director of the amicable assurance. 696
- Mandamus* for yeoman of the wood-wharf. 832
- Mandamus* to admit a deputy register. 893
- A principal may have a *mandamus* to admit his deputy. 895
- The writ need not aver that it is the persons' duty to whom it is directed to admit and swear him. ibid.
- To allow constables their expences of carriages for the troops. 42, 43
- To reimburse a surveyor of highways. 211
- To a judge in nature of a *procedendo*. 113
- To justices of peace to give judgment in an excise case. 530
- Granted to commit administration generally. 552
- To take security on articles of the peace. 835
- Mandamus* to the clerk of a company to deliver books. 879
- To produce the books at the next assembly. 948
- Granted to attend a court-leet. 1207
- No *mandamus* for a lecturer. 1192
- Lies not to swear in one who has had judgment on an information against him for an usurpation. 625
- To call a vestry for the election of churchwardens, refused. Page 68
- Mandamus* lies not to grant a licence to keep an alehouse. 88
- Lies not for an administrator *during minori etate*. 80
- No peremptory *mandamus* pending error on action for false return. 98
- Refused, to make a rate to reimburse the expence of defending an indictment. 6
- No *mandamus* to insert particular persons in a poor's rate. 119
- Superfeded for misdirection.
- Distinct rights cannot be joined in one *mandamus*. 57
- To obtain a rule to return a *mandamus* you must have an affidavit of service. 78
- But though the case is not within the *mandamus* act you may have such a rule and are not driven to an *alias* and *pluries*. 78
- Mandamus* to restore, must be directed only to the body that had power to remove. 60
- But where the power is in the mayor, aldermen *et al' de communi concilio* the writ be directed to the mayor, aldermen and common council it is well enough. 60
- Mandamus* to elect, directed to those who have, and those who had no right, is perfred. 9
- Mandamus* made out not according to the rule, superfeded. 80
- Not superfeded on affidavits, without return. 113
- Court refuse to fix a day for an election on granting a *mandamus*. 94
- There need not be a four days rule of *mandamus* in town. 80
- If a *mandamus* to the spiritual court to grant a probate state that the testator had *bona notabilia* in divers dioceses it need not state them to be within that province over which that court has jurisdiction, especially if the judge has once acted. 80
- A return is good if it pursues the suggestion of the writ. 120

Return that the officer was at will, and they have removed him, sufficient.

Page 115

Where an officer is at pleasure, the choice of another is a determination.

674

When the return to a *mandamus* to restore to academical degrees alledges a suspension or degradation of the party, and does not state that he was summoned to attend the proceedings or made any defence thereto, it is bad.

557

If it states that *A.* exhibited *Quosdam depositiones*, *Quare* Whether that implies that they were upon oath? *ibid.*

An inhibition of the bishop not a good return to a *mandamus* to swear a churchwarden.

609

Where an inhibition is returned in such a case it must appear from the return that the town is within the diocese of the bishop who inhibits.

609

Where a good return to a *mandamus*.

763

Where a writ is directed to two, there must be an attachment against both though one is ready to obey.

808

Non fuit electus no good return to a *mandamus* to swear a churchwarden.

894.

contra 895

A ministerial officer must obey the writ in all events.

895

A *mandamus* is only to give a legal, not an actual possession.

538

Error will not lie on the award of a peremptory *mandamus*.

536

Error lies not on allowing the return of a *mandamus*.

628

Where on trying a traverse in a return no damages are given, this cannot be supplied by writ of inquiry.

1052

What number of days are requisite between the *teste* and return of a *mandamus*.

407

On a return to a *mandamus* of a custom in *London* to hold courts for the admission of freemen, the place of holding them is sufficiently stated if it be averred to be held within the city and the time where need not be stated.

1112

Market.

There can be no market overt for pawning.

Page 1187

Erecting a stall in a market is not of common right; and trespass is the proper remedy for so doing.

1238

Stallage is due to the owner of the soil where a market is held.

1239

Toll is not incident to a market.

1174

Marriage.

Of a wife's niece unlawful.

53

Of the suppletory oath in a matrimonial cause.

80

Marriage Settlement.

Cases of private agreements in fraud of marriage settlements set aside.

240

The fortune of a wife may be settled on husband till he fails, and then to her separate use.

947

See Agreements.

Marshall.

The penalty for not giving a note of a prisoner, to be recovered by suit.

50

Master and Servant.

Subscription money paid to a servant of the *South sea* company, who pays it over, but does not make the proper entry; the subscriber has no remedy against the servant.

480

Trover lies against the master for goods delivered to the apprentice.

505

Where the master has once paid for goods delivered to the servant on trust, the tradesman may trust him after.

506

Master liable for a fraud of the apprentice.

653

How the servant is to justify an assault in defence of his master.

953

Action lies against a servant upon a bill drawn on him and accepted generally,

nerally, though the order is to place it to the account of the master. Page

955

In action against the master for his servant's default, the servant having a release from his master admitted a witness for him. 1083

Mayhem.

A defendant indicted of mayhem need not appear at the bar to plead though it is laid "*felonice*." 1100

Memorandum.

A special memorandum ordered, that the defendant might not be deprived of his plea of tender. 638

Mines.

In ejectment for mines the possession of the manor is no evidence, to prevent the statute of limitations. 1142

Misnomer.

If the defendant omits to plead a misnomer he may be taken in execution by the wrong christian name. 1218

See Name.

Modus.

Custom of paying tithe of wool by the pound and not by the fleece is no *modus*. 783

Mortgage.

Third mortgagee buying in the first should be prior to the second. 689

Proceedings on a mortgage may be staid by the purchaser of the equity of redemption, without payment of a bond. 1107

Equity will oblige the mortgagee to suffer the mortgagor to present to a living. 403

Where money is lent on a pledge, the borrower is liable, without an agreement to the contrary. Page 9

Mortuary.

Cannot sue in equity for a mortuary.

Murder.

Firing a pistol out of a chaise in a street, and death ensuing, held murder.

A defendant arrested strikes the officer they afterwards kill him; held murder.

If *A.* says he will revenge himself on *B.* or that he will have his blood, and he expresses malice against *B.* and a killing ensues, it is murder.

If *A.* and *B.* having had a sudden quarrel and blows pass, and a sufficient time then elapses for *A.* to have cooled and afterwards he kills *B.* it is murder.

It is the province of the judge from particular circumstances of the case, to determine what is malice, and whether the killer had a sufficient time to cool.

It lies upon the slayer to extenuate the fact of killing which *prima facie* is always murder.

Proceedings in appeal of murder.

Confining a prisoner with a person infected with the small-pox who is afraid of the distemper, catches it and dies of it, murder.

If a gaoler confines his prisoner against his will in an unwholesome room without allowing him the necessary requisite to cleanliness, &c. where he contracts a distemper of which he dies, this is murder by duress.

If the verdict find that the principal gaoler knew the condition of the room, and that within 15 days of the death the deceased was present, with his deputy and the deceased under the duress of the said imprisonment, sufficient to amount to murder.

I N D E X.

Malice must be inferred from the facts found; but the consent of one to the act of another is matter of fact, and must be found by the jury. *Page* 886

The depositions taken by the coroner, and not the verdict, are to rule the court as to the expedience of bailing. 911

Name.

MISNOMER in the *Christian* name, fatal. 156
Any variation in the name of a corporation is fatal. 787
Clarencieux is part of the name of the officer. 850
If the defendant omits to plead a misnomer, he may be taken in execution by the wrong *Christian* name. 1218
Earl of, &c. a sufficient description, though the *Christian* name is mistaken. 316
Corporation may acquire a name by reputation. 614

Pist prius.

A cause made a *remanet* for want of praying a *tales*. 707
The traverser of an inquisition for the King is to be considered as a defendant, and the prosecutor may carry down the record. 1208

Nonconformists.

Teacher at a meeting-house not liable to poors rate. 745
Information not granted against a dissester for not taking upon him the office of sheriff of *London*. 1193

Nonsuit.

Jury discharged because the defendant did not appear to demand the plaintiff. 267

Where the plaintiff is nonsuit on the issue, contingent damages on the demurrer shall not be assessed. *Page* 307

Notes. See Bills of Exchange.

Notice.

Notice of trial to a turnkey is good against a prisoner. 248
Notice of trial can not be twice continued in the same term. 1119
Notice to execute a writ of inquiry by such an hour, is uncertain. 1112
On notices of trial the distance from *London* is taken by computed miles. 954, 1216
Notice of trial given upon the issue is good, though without date, &c. 1237
On an old issue notice of trial given before the first day in full term is sufficient. 211
A term's notice must be given before the effoin day. 1154
An intervening notice prevents the necessity of a term's notice. 511
There must be a term's notice of executing a writ of inquiry, where the re has been no proceeding for a year. 1180
Countermanding notice in a town castle two days, and in a country castle four days, shall save costs. 849, 1073
The four days of countermand must exclude the day of giving it. 849
See *Inquiry, Rules*.

Nuisance.

Judgment of abatement is unnecessary, when the nuisance is temporary, as for steeping stinking skins. 686
Making great noises in the night, a nuisance. 724
Keeping gunpowder in great quantities is a nuisance. 1117
See *Highways, Indifferent*.

Oaths.

JUSTICES have no discretionary power to omit tendering the oaths.

Page 413

Where a corporation has power to make statutes, they cannot give themselves a power to administer an oath. 537

Where the charter does not give a power of administering oaths of office, there must be a *dedimus* for that purpose. 539

Where there is an entry of administering oaths, by the town clerk to a corporator, the court will not grant an information upon his affidavit, contrary to the record, especially after a long acquiescence. 677

*J*ews allowed to cover when they swear. 821

A. Mahometan sworn on the *Koran*. 1104

It is a good custom for persons to be admitted to freedom to be obliged to swear on the New Testament. 1112

Obligation, See **Bond**, **Resignation**, **Trades**.

Office.

The traverser of an inquisition for the King is to be considered as a defendant, and the prosecutor may carry down the record. 1208

Officers.

The court will not turn a prisoner over till officer paid for bringing him up. 308, 1262

Where an officer is at pleasure the choice of another is a determination. 674

Where there is an entry of administering oaths, there must be a recent prosecution if the fact be false. 677

See **Mandamus**.

Orders.

Order to common intent is good. 211
Justices of peace may supersede their own orders for surprise. 6

Sessions may quash an order for defect of authority in the justices. P. 300

Order of sessions quashing an order of removal by two justices of *A.* reciting that they had perused the charter of *A.* and that it did not appear thereby that either was of the quorum, quashed. 300

Though the parishes are the same, yet different persons cannot be removed by the same order upon independent settlements. 471

Not necessary to set forth the summons or appearance. 630

Evidence of fraud is not sufficient in an order. 1156

Sessions cannot amend orders by adding new averments. 1156

Order of sessions upon appeal need not say of the party grieved. 90

Order reversed is final to the parties confirmed, to every body. 231

Where a statute directs a complaint to be made in writing, it must be recited so. 260

For a parish to contribute, must be in a sum certain. 311

Adjudging the party likely to become chargeable is sufficient, without saying to what parish. 391

Removal of a certificate-man need not state that he has gained no settlement since. 401

Order to remove a married woman good, unless it appears she is separated from her husband. 541

After an order of removal is quashed the party cannot be removed a second time without stating a new settlement. 561

Order of removal of a person likely to become chargeable sufficient, without saying to what parish. 601

For a parish to contribute so long as the justices shall think fit, ill. 701

Orders for raising vagrant money ought to be made quarterly or half-yearly and to specify the time for which it is raised. 101

In order of bastardy, it must appear that the child was born in the parish to which relief is ordered.

In an order of bastardy made at the sessions, a summons presumed. *P.* 475
 Discharging an apprentice without assigning a good reason, ill. 704
 On removal of clerk of the peace, the evidence need not be set out in the order. 996
 The court will intend an order late served, where the order on appeal is made at the next sessions but one. 1168

Costs are not to be paid where any material part of an order is quashed. 1198
 See *Settlement, &c. Highways.*

Ordinary.

No ornaments can be set up in the church without consent of the ordinary. 576
 But an appeal lies from his sentence to his metropolitan. 1080
 Ordinary cannot appoint churchwardens 52

Overseers.

Sessions cannot meddle with overseers' accounts, till allowed by two justices. 983
 Vestry cannot order sessions to retain balance of their accounts. 992
Mandamus to appoint overseers in an extraparochial place. 512, 1004, 1071, 1143
 Overseers may be appointed at any time of the year. 1123
 Appointment of overseers must stile them substantial householders in the parish. 1261

See *Poor, Settlement.*

Outlawry.

One apprehended by an officer may surrender within the year, in order to reverse an outlawry for treason. 824
 On reversing an outlawry, the court have a discretionary power to order special or common bail. 1178
 On error to reverse outlawry no bail is required till the reversal. 951
 An action lies for the escape of a prisoner outlawed, 901

VOL. II.

Oyer.

Where a deed is pleaded, the other party cannot allege there is other matter contained in the deed, but must set it forth upon *oyer*. *Page* 227

Defendant who craves *oyer*, shall have as many days to plead after the rules are out, as were unexpired when he made the demand. 705

Oyer of the Baron's fiat for an extent cannot be had, but when appearing upon that writ, the court are bound to take notice of it. 749

Where in an action of covenant the declaration does not import that the instrument for which it is brought is a deed. If it be set out upon *oyer*, and concludes with "*In witness whereof I have hereunto set my hand and seal,*" this will not help the declaration, for sealing is a fact which either ought to be positively averred, or something set forth in the declaration which necessarily imports it. 814

Not to be dispensed with, though the deed is lost. 1186

Where a deed is in the hands of a third person, the court will oblige him to give *oyer* and produce it. 1198

A party who has had *oyer* is not obliged to set it forth. 1241

Where a prior recovery in the same court is pleaded, the plaintiff instead of replying *nul tiel record* may have a rule for the rejection of the plea unless *oyer* has been given of the judgment. 823

See *Protest.*

Papists.

A Papist tenant in tail suffers a recovery to the use of himself in fee, in order to make a marriage settlement; this is not a purchase within 11 *W.* 3.

c. 4. 267

Consequence of a foreign popish education. 318

Conviction not necessary to disable a papist from devising lands in *Ireland*. 1096

See *Recusants.*

Pardon.

It is in the discretion of the court, where bail or security is to be required on pleading a pardon. *Page* 1203

Pardon for a misdemeanour may be pleaded without going to the bar. 816

Pardon pleaded *in forma pauperis*. 1215

The act of grace doth not release a forfeiture to which an interest is vested in another. 529

An act of grace does not discharge penalties in which the crown has no interest. 1272

Does not discharge offences against the statutes of a college. 912

A fact pardoned by the act of grace may be a ground for articles of the peace. 473

Parish Clerk.

Parish clerk is a spiritual officer, and may be there deprived. 776

Quare, If he may make a deputy, &c. without licence. 942

Quare, If he is prohibited from suing in the ecclesiastical court for fees, as being a temporal officer. 1108

Parliament.

Members of Parliament may be sued in C. B. by bill. 734

Of privilege of Parliament after a dissolution, and how to be taken advantage of. 985

The check polls, as well as the original book, must be lodged with the clerk of the peace. 1048

See *Adjournment*.

Parols, See *Exposition of Words*.

Parties.

One of the lessees cannot have a decree for apportionment of rent, without his co-lessee. 95

Partners.

A. and *B.* when breaking up partnership agree that their joint-bonds shall be discharged by *A.* to whom an allowance is made for this purpose, *H.* an obligee of such a bond, knowing of this, agrees with *A.* that the bond shall bear an increased interest of 1 l. per cent.—Many years after *A.* fails, and *H.* brings his bill against the executor of *B.* to compel them to redeem the bond, and held that he shall recover *Page* 409

Pauper.

Pauper not going on to trial, to pay the costs before he try the cause. 420

Shall not be obliged to pay costs of former nonsuit, without circumstance of vexation. 87

A *pauper* is nonsuit and afterwards recovers in a second action, the costs of the first action shall not be set off. 89

Pauper dispaupered for not going on to trial. 98

On indictments the defendants may be admitted *in forma pauperis*. 104

The court refuse to make a rule to take costs on *pauper's* bringing a second ejectment, where he does not appear to be vexatious. 112

Pardon pleaded *in forma pauperis*. 121

Pawn.

A factor cannot pawn. 117

There can be no market overt for pawning. 118

Bailee for safe custody cannot pawn. 119

Where money is lent on a pledge, the borrower is personally liable, without an agreement to the contrary. 91

In what case a company may stay the transfer of stock for the debt of the proprietor. 60

I N D E X

In trover the defendant cannot justify
detaining goods till money laid out on
them is paid. Page 651

Payment.

Where the payer does not apply his
payment, the receiver may apply it;
but he must not apply it to an un-
certain demand, as to a debt from a
testator. 1194

Payment of Money into Court. See
Tender.

Penalty.

Equitable costs not allowed out of the
penalty of the recognisance of bail. 826

If no indictment is directed by a statute
a penalty to the King must be sued for
as a debt. 828

Chancery relieves against penalties,
where a satisfaction can be settled. 453

Perjury.

No conviction of perjury on evidence
of a single witness. 1230

Two persons cannot be jointly indicted
for a perjury. 921

Pillory.

Persons set in the pillory for becoming
bail in fictitious names. 384

Pilots.

Construction of the statute for their re-
gulation. 249

Pleading. Vide Error, Infant.

General Rules.

Words taken exclusive or inclusive ac-
cording to the subject matter. 181

An inconsistent *posse* under a *scilicet* re-
jected, Page 232

Whatever is materially alleged and not
denied is admitted. 297

What comes under a *scilicet* shall not
vitiate. 1095

Pleading letters patent *sub sigillo* with-
out *sigillar* is well. 674

Pleading a bargain and sale without
shewing it to be for a valuable confi-
deration will be ill upon special de-
murrer, but is cured by verdict, or ta-
king issue on a collateral fact. 1229

Declarations.

Where the plaintiff claims an easement
out of the defendant's soil, the de-
claration must set out the title. 6

Where the action is against the original
lessee, the breach need not extend to
assigns. 228

In action for being excluded from the
vestry room, must shew the parish had
a right to meet there. 624

Willielmo, for *Waltero* in the *assumpsit*
vitiates not, if there be no *Willielmo*
named before. 228

Cases of averments of identity, and va-
riances. 298

Alleging the entry of lessee prior to
the commencement of his term will
not vitiate the demand of rent. 550

In an action of escape the description of
the place where the prisoner was sur-
rendered into the defendant's custody
is immaterial. 595

In ejectment in *London* if the house is de-
scribed to be in a wrong ward there
will be a nonsuit. ibid.

Where in replevin the place material.
509

In an *indebitatus assumpsit* the day is not
material, and the alleging a different
time in the replication is no depa-
ture: but in case upon promissory
note, it is. 21, 22

Cumque etiam in trespass ill, 621; but
amendable. 1151, 1162

In an action against a rector for not
taking away his tithe of hay where
3 B 2 the

the declaration averred that plaintiff lost the use of his ground from the day of cutting down the grass, it was held well enough though the parson may let the grass lie long enough to make it into hay. *Page 245*

In B. R. calling the defendant administrator in the declaration is sufficient, without a special averment. 781

Want of an averment in a declaration helped by pleading over. 931

Vide Deed. Oyer.

Plea in abatement.

Affidavit that a plea in abatement is a true plea, ill. 705

Plea of privilege refused to be set aside. 837

A plea in abatement must come in within the first four days. 1192, 1268

General issue.

Non assumpsit a good plea to an action against a carrier. 574

Nil debet not pleadable to debt or articles for not paying for stock. 778

To a declaration on promise to the assignee, *non assumpsit* to the bankrupt is an ill plea. 919

Not guilty in *assumpsit*, ill on demurrer. 1022

Leave to withdraw the general issue, and plead it with a set-off. 1267

Leave to withdraw the general issue and pay money into court. 1271

Plea waived after a joinder in demurrer, the plaintiff having lost no time. 1181

Cannot withdraw special plea, but in order to plead the general issue. 960

See. Issue.

Plea in bar.

An award must be alledged to be made in form according to the submission. 116

Payment on the day, mistaking the day is ill. 317

A discharge from a debt cannot be pleaded generally. 422

In an action upon a bail bond the arrest is not traversable. *Page 444*

A note given cannot be pleaded in satisfaction of an *indebitatus assumpsit*. 426

A plea of the statute of gaming must mention the particular game. 495

A plea of satisfaction must shew an acceptance. 573

Payment of principal and interest is issuable, though it be alledged as of a day which is before the day in the condition. 622

An heir may discharge himself by pleading payment to the value of the lands descended. 665

Where a plea is general, *quod indemnem conservavit*, it must be shewn for cause that it does not say how. 681

Upon a special *capias* by original the defendant shall not be obliged to plead sooner than upon a common *latitat*. 684

Special *nil habuit in tenementis* cannot be pleaded to action for rent on lease by indenture. 817

Where a prior recovery in the same court is pleaded, *oyer* must be given. 823

Where I confess and avoid, I ought not to traverse; and it may be passed over and issue taken upon the avoidance. 837

Where payment is pleaded to a bond *scil.* such a day; the day is not material. 954

A justification under process of university held ill. 993

Where those who might justify join with those who have not a good justification, it is bad as to all. 509, 994, 1184

On a rule to plead as he will stand by, the defendant may stand by his plea already delivered, and the plaintiff cannot sign judgment. 1234

In trespass the plaintiff need only falsify the defendant's title. 1238

Defendant who has *oyer* is not bound to insert it in his plea. 1241

When

I N D E X.

123

Where two partners are sued and one outlawed, the other cannot plead in bar that the outlawry is erroneous.

Page 1269

What pleading is necessary to an information for not repairing a bridge.

179

Vide *Actions Popular, Demurrer, Traverse.*

Venue and Trial.

Where the plaintiff replies full age of the defendant, it is not necessary to lay a *venue*, as it is a release.

8

Qualities of the person triable where the action is brought.

9

An apt issue may be joined, though there is not an exact affirmative and negative.

1177

Pleading double, &c.

Defendant allowed to plead two justifications.

425

Double plea, of tender, and eviction allowed.

496

General issue, and statute of limitations allowed.

678

May plead *non est factum*, and a discharge by bankruptcy.

871

Not guilty, and a justification, not allowed to be pleaded.

876

Not guilty, and the statute of limitations, pleadable.

889

General issue waived, and allowed to plead double.

906

Leave to plead *non est factum*, and no request made.

908

Non assumpsit, and tender, not allowed.

949

Leave to plead bankruptcy generally and specially.

1000

Bankruptcy and *non assumpsit*.

1000

No pleading double in a *qui tam*.

1044

If the defendant does not leave his double pleas in the office, the court will not relieve him for the plaintiff's making up the record.

1266

Cannot rejoin double.

908

Replications, &c.

Where the plaintiff declares upon a possession only, and the defendant pleads *liberum tenementum*; the plaintiff must shew a title in the replication.

Page 5

In debt upon a bond, where the defendant pleads a payment and acceptance in satisfaction; the plaintiff may take issue upon the acceptance, which will be an argumentative denial of the payment.

23

An immaterial traverse does not preclude the other party from taking a traverse upon it.

117

Where the plea contains matter of excuse, it is enough that the replication meets it, except in case of awards.

191, 299

Replication in the copulative, that ditches, ways and passages, were not filled with water, to a plea that they were, is good.

246

Infancy pleaded, and necessities replied, a discharge is a departure.

422

Assumpsit against an executor for a farmer's bill, &c. plea that testator was an infant; replication that the work was necessary for his horses, held ill on demurrer.

1101

Defendant being obliged to transfer stock within three days after request, pleads that the request was made such a day, and that he transferred it the day following, the plaintiff may reply that he did not transfer it on that day.

460

Statute of gaming pleaded, the replication must not take issue upon the particular sum.

493

Replication *non est attorn'* must not conclude *al pais*.

532

To a stock contract the defendant pleads that the contract was not registered before such a day (naming a wrong day) *secundum formam statuti*; the plaintiff tenders issue, that it was registered *secundum*, &c. and has a verdict and judgment.

554

Where there is a traverse the replication should conclude with an averment.

Page 871

The defendant is not bound by a consent to rejoin *gratis*, if the replication shews cause of demurrer. 1185

Where a material point of the plea is denied, the replication must conclude to the country. 1220

Puis darrein continuance, and other matters.

A plea *puis darrein continuance* must be pleaded upon oath. 493

In a *scire facias* on a judgment recovered by an executor, the death of the testator need not be shewn. 631

Repleader awarded after an immaterial issue. 847

Pleading in criminal cases. Vide Whayhem.

Pledges.

Writ of appeal not superseded for false suggestion of pledges found, 854
See *Patron.*

Poor.

Ancient statutes for the relief of the poor. 1067

Vicar's tithes chargeable. 77

Tithes are rateable as a tenement. 100

The sessions may originally charge parishes out of the hundred to contribute. 56

Justices may order one parish to pay a sum in gross to another, but they must make the rate by which it is to be raised. 1114

Overseers may be appointed at any time in the year. 1123

Appointment of overseers must stile them substantial householders in the parish. 1261

Mandamus to appoint overseers in an extraparochial place, 512

Two houses in an extraparochial place are not enough to denominate a *ville* 1040. Five houses do not. 1071

It is a good return to a *mandamus* for appointing overseers, that the place is not a village or township. Page 1143
Sessions can not meddle with overseers' accounts, till allowed by two justices. 983

Vestry cannot order overseers to retain the balance of their accounts. 992

The poors rate is not to be removed. 932, 975

In an adjudication that a *pauper* is likely to become chargeable, it need not be said to such a parish. 142

Order to relieve a poor person must mention him to be impotent. 10

Son in law not bound to maintain his wife's mother. 190

Father not bound to maintain the son's wife. 955

See *Settlement.*

Portions.

Younger children's portions decreed to be raised according to a power not executed, 603

Power.

The possessor of an estate has a power to make a jointure, but dies before a complete execution of the power according to his marriage articles; the remainderman decreed to perfect it. 596

Construction of powers, and their execution, in law and equity. 601

Covenant by a remainder man to execute a power of making a jointure when in possession, decreed to be made good after his death. 604

Construction of a power to make leases. 962

A power to grant a life estate is not well executed by a lease for 99 years determinable on a life. 992

Praemunire.

The *praemunire* clause in the bubble act leaves power in the court to moderate the judgment. 474

Prerogative.

In what cases a juror may be withdrawn for the crown. Page 984

The crown may enlarge the boundaries of a city or county. 177

Where several issues are joined, the king may try which he pleases first. 266

Where the crown has a title to present on promoting the incumbent to a bishoprick, it is not necessary to be done during the life of the promotee. 841

Where a statute inflicts a disability to take lands or a pecuniary penalty for a public crime, and does not declare who shall take, they shall go to the crown. 323, 371, 374

What acts of parliament bind the crown without express words. 516

See Debt to the King, &c.

Prescription and Custom.

Where the original of a way is accounted for, the prescription is destroyed. 909

If any part of a custom as laid be unreasonable, the whole will be void. 1224

Prescription to take three bushels out of every ship's cargo for keyage is good. 1228

Custom of London, that none but free porters shall carry corn, &c. good. 462

Customs of other manors or archdeaconsries not to be given in evidence to prove the custom of a manor, &c. 659, 957

For 24 parishioners, &c. to make a rate, and a certain proportion to be levied on such a hamlet, incertain. 1145

See London.

Presentation.

Where the crown has a title to present on promoting the incumbent to a

bishoprick, it is not necessary to be done during the life of the promotee. But the turn is barred by a presentation by another person. Page 841

Presentation creates a fee in the advowson, and is generally a necessary proof to be alleged of it. 1011

See Quare impedit.

Prison and Prisoners.

The rules may be allowed to a prisoner on *excommunicato capiendo*. 413

One committed for a contempt cannot have the benefit of the rules; nor one in execution for a misdemeanor. 817

Rules of the prison enlarged till prison repaired. 678

A prisoner must sign the petition for a day rule, before he goes at large. 503

Where the defendant is in custody, the declaration must be delivered to the turnkey, and not into the office. 474

The duty of a gaoler is not to punish but confine. 884

Gaoler cannot retake for fees. 909

A prisoner not charged in execution two terms after judgment, is supersedable. 943

A prisoner surrendered by bail, superseded, because charged in the same court after he had removed himself although he had not given notice of it to his plaintiff. 1153

A prisoner is supersedable, unless the *committitur* is entered on record before the end of the second term. 1215

Justices of peace cannot commit one in *B. R.* to the county gaol. 828

Leave given to charge a felon convict with process. 873

One in execution may confess a new judgment without the presence of an attorney. 1245

Privilege.

Members of Parliament may be sued in *C. B.* by bill. 734

3 B 4

Members

I N D E X.

Members of Parliament have privilege
for return after its dissolution. *P.* 985
They may be discharged on motion
without filing common bail. 985
An attorney, though servant to a Peer,
has no privilege of Parliament. 1065
An attorney must be sued by bill, though
the plaintiff be also an attorney. 1141
Attorney suing by original waives his
privilege. 837
An attorney of *C. B.* must plead his
privilege in *B. R.* and cannot be dis-
charged on common bail. 864
An attorney in *London* cannot be sum-
moned on the militia if the service is
personal, 1143
It is personal though it may be served by
deputy. *ib.*
Where an attorney is defendant, he
may change the *venue* into *Middlesex*.
1049
Barrister may lay the *venue* in *Middlesex*.
822
Plea of privilege refused to be set aside.
837
Privilege of the prothonotaries' clerks
must be pleaded with an affidavit. 191
The clerks of a prothonotary of *C. B.*
not entitled to privilege. 546
Attorney or not, to be tried by the re-
cord. 76
A defendant attending the trial at *nisi*
prius privileged. 986
Writ of privilege refused to a justice of
peace, for discharging him from the
office of constable. 698
Clergyman not obliged to be expeditor
of sewers. 1107

Probate of wills.

Prerogative probate without *bona nota-*
bilia, only voidable. 73
Probate is conclusive evidence against a
charge of forging a will. 481
Original of the right of probate of wills.
667
Pending a suit in the spiritual court
touching the validity of a will, an
indictment for forging it ought not to
be tried, 703

Executor may be sued for a legacy
where he proves the will, though he
does not live in that diocese. *P.* 847
The spiritual court cannot refuse to
grant probate pending a commission
of appraisement. 857
Order on the spiritual court to deliver
out a will on security. 961

Procedendo.

One defendant in a joint action in an
inferior court brings a *habeas corpus*,
there shall be a *procedendo*. 527

Process.

Prohibition to the Great Sessions in
Wales, where the process was served,
out of the jurisdiction. 630
Scire facias may be served immediately
before the return is out. 644
In action on false return on mesne pro-
cess the jury may give the whole debt
in damages. 650
Scire facias against bail may be *teste* the
day of the return of the *capias ad*
satisfaciendum. 866
No *scire facias* on recognisance can be
tested the day the party makes default.
1220
On service of copy of process, the pro-
cess itself need not be shewed. 877
Appearance cures defect in process.
1072
Declaration may be with *qui tam*, tho'
the process is not so. 1232
English notice on process is good, tho'
the year be not expressed. 1232
See Return of Writs,

Procurations.

Are due of common right to the ordinary
or his vicar the archdeacon, although
the church for which they are demand-
ed is a rectory impropriate without a
vicarage endowed, and they are pro-
perly suable for in the ecclesiastical
court. 420

I N D E X.

Profert.

- An exemplification will satisfy the pro-
fert of letters testamentary. *Page* 412
Profert of letters testamentary not ne-
cessary, where the executor is not
party to the action. 1261
Matters of record pleaded by way of
dilatatory, if of another court must be
sub pede sigilli. 520
Pleading letters patent *sub sigillo* without
sigillat' is well. 674
Oyer of a deed not to be dispensed with,
though shewn to be lost. 1186
Where a bond is in the hands of a third
person, the court will oblige him to
give *oyer* and produce it. 1198
Defendant who has *oyer* is not bound to
insert it in his plea. 1241

Prohibition.

- If the plaintiff in prohibition prevails in
any part of his case, he shall have
costs. 1062
Costs given from the first motion. 82
After rule to declare, the defendant may
submit and stay proceedings. 1149
In prohibition the contempt is but form,
and the jury need not give any verdict
about it. 482
Refusal of the plea not traversable 483
The ordinary has no jurisdiction to com-
pel churchwardens to be sworn. 52
No prohibition in a suit for tithes, where
the question is between impropriator
and vicar. 87
Not granted to stay suit in the ecclesi-
astical court for procurations. 421
Husband cannot stop the wife's pro-
ceedings in spiritual court for defama-
tion. 576
Prohibition to suit by a clerk of a parish
for fees. 1108
Not to go after sentence, in suit for
calling whore in *London*. 187
Words tantamount to *whore* are within
the custom of *London*. 471, 545
Strumpet tantamount to whore in *Lon-
don*. 555, 823

No prohibition for *You are a barnd*.
Page 1100

- Where a deed comes in by incident, the
admiralty may try whether it was
fraudulent. 761
Suit in the admiralty by a part-owner
to give security for the ship, not pro-
hibited. 890
Prohibition to the Great Sessions in
Wales, where the process was served
out of the jurisdiction. 630

Promissory Notes. See *Bills of Ex-
change*. Property explained. See
Gift, Pawn, Trover, Purchase.
275, 277.

Quakers.

- AFFIRMATION no ground for an
attachment for non-performance
of an award. 441
Cannot exhibit articles of the peace
without oath. 527
Quaker no witness in an appeal of
murder. 856
Affirmation not to be read on a motion
for information. 872
No rule to answer on the affirmation of a
quaker. 946
Affirmation of service of a rule on the
crown side may be read. 1219

Quare impedit.

- In quare impedit by the crown for the
next turn of a living void by promo-
tion, defendant pleads that the crown
presented *A*. who is since dead, and
that he himself is now presented and
is parson imparsoned with a traverse
that the church is still vacant by the
promotion; this is a confession and
avoidance, and the traverse being
therefore bad may be passed over and
issue taken upon the avoidance 837
The declaration having set forth that *B*.
the late archbishop was seised as of
fee in right of his archbishopric of the
advowson of the church of *A*. &c. and
the archbishop in his plea admits this
seisin

seisin and a vacancy by promotion as alleged in the declaration, but insists that the crown by patent granted to *D.* the deanery of *A.* with all its rights, members &c. by virtue whereof he was possessed of the church of *A.* is a member of the deanery &c. this is ill, as it neither shews a presentation nor that the church was a member of the deanery. Page 837

Subscribing the articles need not be alleged in *quare impedit* either in the declaration or plea. 843

It is generally necessary for the crown to allege a presentation in a *quare impedit* as well as a subject; but the want thereof may be cured by a verdict. 1006

Setting out a *commendam retinere* does not amount to such an allegation. 1006

But where the verdict finds that the crown was seised in fee *ut uno grosso*, it cures the want of it. ib.

Vide *Prerogative, Presentation.*

Quo warranto.

Plea that is insufficient, confesses the usurpation. 394

There must be a judgment of *ouster*, where the party is found duly elected but not sworn. 582

Where the defendant confesses an usurpation for part of the time only, there can be no judgment of *ouster*. 952

A bare swearing in and acting, does not make a man an officer *de facto*; and unless there is some form of election, he is a mere usurper. 1090

A judgment of *ouster* against the magistrates before whom the defendants were sworn, proper evidence. 1109

Information lies for acting as a trustee under an act of parliament without due appointment. 299

Lies against a steward of a court leet. 621

Lies for setting up a new office. 836

Quo warranto lies for a ferry. 1161

Quo warranto lies for the office of constable. 1213.

No information for erecting a warren. 637

No *quo warranto* for a forfeiture by non-attendance. 819

No *quo warranto* for office of churchwarden. Page 1196

Costs given on discharging a rule for a *quo warranto*. 1039

The court will not grant information, where the only acting is voting for parliament men as burgesses when they had the same right though they were not so. 547

Rates.

THE King's bench will not examine objections to a poor's rate. 393

Owner of tithes charged as occupier, where he lets them to the tenant of the land. 525

A scavenger's rate cannot be made for a division in which there are no parish officers. 630

A person is not chargeable to the poor's rate as being the occupier of the meeting house where he preaches. 745

Poor's rates not to be removed by *certiorari*. 932, 975

See *Ulagrant.*

Recognizance.

On a recognizance to appear in *B. R.* on the last day of term, the party has till the last moment of it to appear in. 1210

Records.

Rule to make up a new record, where the first was lost. 141, 833

New writ of inquiry, &c. ordered to be made on loss of the former. 1077

Judgment entered *nunc pro tunc*. 917

Figures are not to be used in records, but *Roman* numerals may. 261

Officer may be examined as to the condition in which records are preserved, though not as to the substance. 210

Presentation must be in *Latin*. 870

Conviction of forcible entry in the *preterperfect* tense ill. 443

Of

I N D E X

Of swearing, in the preter tense ill. *Page*
608
A defendant in a capital case refused a
copy of his acquittal. 856
B. R. does not send the record to the
Exchequer chamber. 837
A bill of *Middlesex* is well described as
the precept of the king. 1069
Plaintiff cannot enter a *remittit* in another
term. 1110

Recovery.

A recovery is a method of defeating an
estate tail excepted out of the statute
de donis. 272
A surrender of tenant for life shall be
presumed on a recovery of forty years
standing. 1129
Tenant in tail by purchase with the re-
version in fee *ex parte materna* suffers a
common recovery; the old use is gone,
and it descends to his right heir. 1179
A recovery without seisin is imperfectly
found; and no *venire facias de novo*
shall go. 1185
Error to reverse a recovery is barred by
20 years, though the title of plaintiff
accrued within the time. 1257
Where bad deeds to create a tenant ap-
pear, a good deed is not to be pre-
sumed. 1267

Recusants.

Of the disabilities accruing from being
sent to a foreign popish seminary.
318
Conviction of recusancy certified in *B. R.*
must be pleaded there *sub pede sigilli*.
522
The judgment for recusancy is, *quod*
convictus est. 1048
A conviction is not necessary to prevent
the devise of lands by a papist in
Ireland. 1095

Register.

A purchaser with notice of a prior in-
cumbrance, is not protected by the
not registering it. 664

Registering an assignment is not registering
the lease. *Page* 1064

Remainder.

Cross remainders do not arise by im-
plication in a will without necessary
words. 969, 996

Rents.

Landlord has no remedy against the
sheriff, if he does not make his de-
mand before removal of the goods.
97
Administrator of a landlord within the
statute 8 *Ann. c. 14*. 212
On execution the landlord's rent shall be
paid without deduction of sheriff's
poundage. 643
Where there is a covenant to pay rent,
an action lies, though the lessee has
no enjoyment by the default of the
lessor. 763
Ground landlord cannot come in for
rent on execution against an under-
lessee. 787
Where there are two executions, the
landlord cannot have a year's rent on
each. 1024
Where two parcels of land are distinctly
let, there cannot be a joint distress for
both rents. 1040
Landlord a trespasser, for not removing
distress at the end of five days. 717

Replevin.

No replevin of goods taken upon a con-
viction. 1184
Where in replevin the place is material.
507

Rescue.

No attachment on affidavit of rescue,
without a return. 531
In an indictment for a rescue, it must
appear for what the party was com-
mitted to the house of correction.
1226

I N D E X.

seisin and a vacancy by promotion as alledged in the declaration, but insists that the crown by patent granted to *D.* the deanery of *A.* with all its rights, members &c. by virtue whereof he was possessed of the church of *A.* is a member of the deanery &c. this is ill, as it neither shews a presentation nor that the church was a member of the deanery. Page 837

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Cross remainders do not arise by implication in a will without necessary words. 969, 996

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Landlord has no remedy against the sheriff, if he does not make his demand before removal of the goods. 97
 Administrator of a landlord within the statute 8 Ann. c. 14. 212
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 Where in replevin the place is material. 507

Rescue.

No attachment on affidavit of rescue, without a return. 531
 In an indictment for a rescue, it must appear for what the party was committed to the house of correction. 1226

I N D E X.

Resignation.

General bond for resignation of a benefice is good. Page 227
 Bond of resignation not allowed, where money has been paid upon it. 534

Return of writs.

Rule upon the executors of a bishop, to return a *scire facias de bonis ecclesiasticis*. 87
Scire facias in chancery returnable *ubique*, good since the union, without in *Anglia*. 146
 Writ abated for an improper description of the return day. 147
Non sunt inventi, no good return without *nec eorum aliquis*. 225
 Attachment for a rescue must be returnable at a general return. 624
 Fifteen days with the *teste* and return are good. 765
 The return day of *quindena Trinitatis* is the *Sunday*. 811
 Where a *scire feci* is returned, the court will not set it aside for want of notice. 813
 There need not be a four days rule on *mandamus's* in town. 857
Latitat may be returnable in one day after the *teste*. 917
 It is no objection to proceeding on error, that the return is not signed by the Chief Justice. 1063

Robbery.

A taking in the presence is a taking from the person, and felony, but in special verdicts it must be expressly found that the party robbed was present at the taking. 1015

Rules.

Sunday reckoned in rules to plead, &c. 86
 Rule for one not party to attend the matter. 477

Where a person is prosecuted for dangerously wounding another, he cannot have a rule for his surgeon to inspect the wounds, in order to be admitted to bail. Page 547

Upon a special *capias* by original, the defendant shall not be obliged to plead sooner than by a common *latitat*. 684

In a common action the court will not rule the attorney to give an account where the plaintiff lives. 705

After *oyer* prayed, the party shall have the same time to plead after *oyer* given, as he demanded *oyer* before the rules were out. 1144

Service of a rule for an information at the house, not good where the defendant is gone to sea. 1044

Rules of K. B. prison. *Vide Prison*.

Satisfaction. See *Accord*.

Scavengers.

A Scavenger's rate cannot be made for a division in which there are no parish officers. 630

Schools.

The bishop may take time to inquire into the character of one elected school-master before he licenses him. 1023

Scire facias.

To repeal a grant of a market, not abated by the demise of the crown. 43

Executor cannot plead judgments to the *scire facias*, which he might have pleaded in the action. 734

In a *scire facias* on a judgment recovered by the executor, the death of the testator need not be shewn. 631

After two *nichils* the court will relieve on motion, if the defendant comes in a reasonable time. 1075

See *Proceedings against Bail*.

I N D E X.

Sessions.

- The sessions cannot set aside the assignment of an apprentice bound out by justices. Page 48
- May originally charge parishes to contribute to the maintenance of the poor of a parish in another hundred. 56
- Order upon appeal need not say *of the party grieved*. 96
- Have an original jurisdiction to discharge apprentices. 143
- Appeal may be dismissed for want of the notice appointed by the sessions. 315
- Have power to look into the jurisdiction of justices of towns, &c. upon an appeal against an order of removal made by them. 300
- Where an order is made at an adjourned sessions, it must appear the sessions began in time. 832
- An indictment found at an adjourned sessions must shew in the caption when the sessions began. 865
- Indictment at the sessions for perjury at common law, quashed for default of jurisdiction. 1088
- See *Sessions popular, Justices of peace*.

Settlement.

- Ancient statutes relating to the settlement of the poor. 1067

Orders of removal.

- Complaint may be to one justice, but order of removal must be by two. 73
- Examination of a *pauper* must be by both the justices. 1092
- Orders of removal need not mention every requisite circumstance. 211
- Order to remove *A.* and his family, bad as to the family. 114
- Adjudication that it *was* the place of his last legal settlement held good. ibid.

That the *pauper* is come into the parish, not a necessary part of the adjudication. Page 189

- Adjudication of the husband's settlement is sufficient to send the wife with him. 527
- After an order of removal is quashed, the party cannot be removed a second time, without stating a new settlement. 567
- Woman's settlement before marriage remains, if husband has no settlement. 683
- Long possession is a settlement, till the right is determined. 608
- A child may gain a new settlement with the mother after the father's death. 746
- Where children are sent as actually settled, their ages need not be set out. 1047
- A child cannot be with the grand-mother for nurture. 1131
- An order unappealed from to remove a man and his wife is conclusive as to after-born children. 1172
- Order reversed, final to the parties; confirmed, to every body. 232

Certificate.

- The reversal of an order of removal of a certificate-man before he is chargeable, does not prevent the removing him when he is. 1256
- Certificate man not removable till actually chargeable. 77
- A certificate must be allowed, not witnessed only, by two justices. 94
- A settlement may be gained by a certificate man by descent of a copyhold to his wife. 163
- Certificate to husband and wife concludes the parish from saying they were not married. 186
- Certificate conclusive to the parish that gives it as to the marriage of the *pauper*, &c. 1233
- Where a certificate-man gains a settlement, his apprentice shall gain a settlement. 265
- Executing

I N D E X.

Executing the office of constable settles
a certificate-man. *Page 1014*

A certificate-man's apprentice being assigned to a parishioner gains a settlement. *1147*

A certificate-man may be sent back though there is a mistake in the name of the parish to which the certificate is addressed. *1163*

The son of a certificate-man gains no settlement by a hiring and service. *1165*

A certificate-man gains a settlement by purchase. *1193*

A certificate-man must be sworn into an office, else he gains no settlement by executing it. *1199*

Inhabitaney and Birth.

A married woman gains no settlement by living with an adulterer. *51*

Not gained by a sea-boy who lies on board. *60*

A stall no inhabitaney. *51*

The settlement of the son follows the settlement of the father so long only as he continues part of his family. *438*

A person irremovable needed not give notice before *3 & 4 W. & M.* *470*

The forty days inhabitation of an apprentice need not be all together. *579*

Children born where the father is not settled, may be sent to his settlement after his death. *580*

If a son grown up does not remove with his father, he gains no settlement in the last place his father lived. *831*

There cannot be a settlement by constructive notice. *853*

Annual Offices and Taxes.

Office of collector of a revenue gives a settlement. *411*

Executing the office of tithingman gains a settlement. *544*

Paying to the poor gives no settlement if not rated. *1023*

Officiating as school-master and receiving *10 l. per ann.* does not gain a settlement. *1225*

Tenements and Purchases.

Gained by taking an intire tenement though in two parishes. *Page 57*

By two tenements in the same parish. *ibid*

Obtaining a term by act of law, though of small value, gains a settlement. *97*

A person settled in *A.* has an estate descended to him in *B.* he cannot be sent thither. *476*

A lease at will gains a settlement. *502*

An intire tenement of *10 l. per annum*, though it lies in two parishes, gives a settlement in that where the party lives. *529*

Renting a coney warren is a settlement. *678*

Renting above *10 l. per annum* in two parishes is a settlement where he lives. *849*

Renting the pasture of land is no settlement. *874*

Prisoner gains a settlement by renting *10 l. a year.* *924*

A man cannot be removed from his farm. *983*

Though part of the purchase money is advanced by another, yet if there is no fraud a settlement may be gained. *1014*

Renting a wind-mill is a settlement. *1077*

A settlement is gained by living on his own estate, and remains after the estate is sold. *1116*

Agreement at *10 l. a year*, the landlord to make improvements, no settlement unless the improvements are made. *1127*

The court will presume a lease to be by deed. *555*

Allowing a debt in a purchase, is a good purchase of *30 l. value*, to make a settlement. *1162*

Apprenticeship.

A. is bound to *B.* but serves *C.* his settlement is in *C.*'s parish. *10, 554*

I N D E X

The bankruptcy of the master does not dissolve the apprenticeship. *Page* 582
 Apprentice is settled where he lies. 594
 Where the duty on apprentices is not paid, the apprentice gains no settlement. 903
 Apprentice hired out by the master gains a settlement where the service is performed. 1001
 An apprentice bound for four years only, gains a settlement. 1066
 Apprentice turned over by his master's widow gains a settlement with the new master. 1115

Hiring and Service.

Several hirings for eleven months each and service, gain no settlement. 83
 A hiring and service for a year wanting a week, insufficient. 143
 Going away twelve days before the end of the year prevents a settlement. 1022
 A farmer makes over his stock and servants to another, this does not hinder the servant from gaining a settlement. 90
 Sickness or absence for reasonable cause does not prevent a settlement. 423
 The servant of a visitor gains a settlement. 524
 Turning the servant out of doors before the end of the year does not prevent the settlement. 526
 Hired servant is settled where the service is. 528, 794
 A servant before 3 & 4 W. & M. need not be hired for forty days. 746
 Service for a year on different hirings for a year, a good settlement. 878
 Hiring at yearly wages for a quarter, and if the parties like, to continue a year, sufficient for a settlement. 950
 Hiring for a year and to be paid according to the quantity of work, gains a settlement. 1139
 Serving out the year with an executor in another parish is a settlement there. 1164
 Agreement to part on a month's notice does not reduce it under a hiring for a year. 1182

Absence of servant by the master's permission does not prevent a settlement. *Page* 1207

Servant going to sea with his master's leave, and finding another to do his work, is settled. 1233
 Servant removing with his master in the second year gains a settlement though there was no new hiring. 1240

Settlers.

Rate may be made to reimburse charges. 1127
 Objections to orders removed must be argued before they are filed. 1263
Certiorari to remove an order of the commissioners for the removal of their clerk, held to be due of right. 609

Sheriff. See *Bail, Escape, Fees.*

Ships.

The owner who has let his ship to another is still liable for a loss of gold sent by the ship. 1251
 For repairs, &c. done to a ship, the master or owners are liable, at the election of the tradesman. 816

Simony. See *Resignation.*

Smugglers.

If one smuggler has no arms, he is not within the statute, though the others have. 1166

Soldier.

A person listed and qualifying himself, shall be taken to be doing duty, and must be discharged upon common bail. 2
 A gunner is a common soldier, and to be discharged upon common bail. 7

I N D E X

Solbit ad diem.

If any interest was paid upon an old bond after the day, it must be a plea upon the statute. Page 652

Specific performance.

Specific performance decreed, where the party insisted to forfeit the penalty. 533

See Agreement.

Stamps.

A *distingas* stamped before the exception taken, though not stamped at the time of the trial, held good. 575

A deed is good though executed before stamped. 624

How to authenticate an admission that is not stamped at the time. 716

Judgment granted on the first motion for the penalty of not filing common bail. 737

Statute.

Promise of marriage not within the statute of frauds. 34

What writing is necessary to bring a case out of the statute of frauds. 236

Construction of the statute for the piloting of ships. 249

Statutes made *pro bono publico*, to be expounded so as to attain their end. 253, 258

A copy of statutes examined with the parliament roll preferred. 446

What acts of parliament bind the crown, though not named. 516

If no indictment is directed by a statute, a penalty to the king must be sued for as a debt. 828

Certioraries relating to the highways are taken away by 3 & 4 W. & M. though to remove orders made on a subsequent law. 944

Though the time in a temporary law is expired, yet if it be continued,

facts may be said to be done by virtue of the first law. Page 106

The statute 21 Jac. 1. for filing affidavits in popular actions, does not extend to subsequent penal statutes. 108

The statute 21 Jac. 1. does not give new jurisdiction to the assizes or sessions. 110

Suits. See Declarations, Pleading

Sundays and holidays.

Sunday reckoned in the rules to plead. A writ of inquiry cannot be executed on a *Sunday*. 3

And the court is bound to look into the almanack and take notice of it though not specially assigned for error. 3

Selling meat on a *Sunday*, no offence common law. 7

Surety of Peace.

A fact committed before the act of grace may be a ground for articles of the peace. 4

Mandamus to take security on articles of the peace. 8

The court will not inquire into the truth of articles of the peace. 12

But they will review them after security has been ordered upon them, and lay any objection that appears upon the face. 12

Husband may swear the peace against his wife. 12

How to take security of the peace, when a marriage is disputed. 12

The court will not require one party on an indictment for murder promising to conviction to find sureties for good behaviour, unless he appears to be a person of ill fame. 12

Surrender.

Conditional surrender of a prebend lease, good to warrant a return.

See Recovery.

Swearing.

a conviction the particular oaths must be set forth, and the degree of the defendant if the higher penalty is insisted. Page 497, 686

Test.

TENANT in tail of a trust may bind his heir by articles, in equity. 602

Taxes.

an exciseman is to be taxed in the division where he lives. 417
the tenant shall not deduct land tax to the improved value in account with his landlord. 1191
Customs, Debt to the King, Rents.

Tenant. See Taxes.

Tenant-right.

the nature of that holding. 654

Tender.

tender may be pleaded to a quantum meruit. 376
a tender pleaded, the money must be paid into court, or the plaintiff shall take judgment. 638
tender of more than due is good. 916
money brought in on pleading a tender cannot be taken out by the defendant, though he has a verdict, 1027
special memorandum ordered, to give the defendant opportunity of pleading a tender. 638
on a covenant to do an act, the other party paying so much money, a tender of the money need not be alleged. 458

Tender of stock, how to be proved. Page 504

What a tender of stock. 533
If a tender of stock must be on the very day. 579
The tender of stock must be at the last part of the day that it can be accepted. 777
In tender of stock, the usual hours of transferring must be set forth. 832
Introduction of paying money into court. 787
Bringing money into court, refused in debt. 890
No bringing goods into court in trover. 822, 1191
In trover for money, leave given to bring it into court. 142
Money may be brought into court at the suit of an executor. 796
In action for immoderate riding, cannot bring money into court. 787
In action for dissipation money cannot be paid into court. 906
Penalty of a penal statute brought into court. 1217
If the costs are not paid on bringing money into court, the plaintiff must go on, and cannot have an attachment. 1220
In debt upon bond conditioned for payment of money by instalments, the payments due can not be brought into court upon the statute 4 Ann. c. 16. 515
Debt on bond stayed on bringing into court the instalments in arrear. 814
Money due by the first installment may be brought in, but not to stay the plaintiff from signing his judgment. 957
Amends not pleadable to trespass for taking goods. 549
Principal and interest, &c. brought into court on ejectment upon a mortgage. 413
Proceedings in ejectment staid on bringing arrears of rent into court. 900
Proceedings on a mortgage may be staid, without payment of a bond. 1107

I N D E X

Term.

The term in which bail is put in reckoned one of the two terms in which plaintiff must declare. Page 631

See Notice.

Time.

In contracts for stock the computation must be by lunar months. 445

See Days and times.

Tithe.

The parson is not obliged to take tithe of grass the day it is cut, but may let it lie long enough to make it into hay. 245

Toll.

Toll is not incident to a fair. 1171

Trades.

Indictment for using a trade used in Great Britain at the time of the Statute 5 Eliz. quashed. 552, 788

Debt upon a bond to A. conditioned that in consideration of her teaching B. a trade that B. shall not after leaving her service either by herself or any person for her use, carry on or instruct any other in that trade within half a mile of A's. now dwelling house, or of any other house that she, her executor or administrators shall remove to, is good where the breach assigned is for instructing B's husband in that trade within half a mile of A's then house. 739

Traverse.

In an action upon a bail-bond the arrest is not traversable. 444

Traverse of a seisin in fee is ill where a less estate would be sufficient. 818

Where I confess and avoid I ought not to traverse, it may be passed over and

issue taken on the avoidance. P

The traverse of an inquisition for King is to be considered as a defendant, and the prosecutor may call down the record. 12

Trespass does not lie for taking a cessive distress. 8

In trespass and false imprisonment defendant justifies under a process *est eadem, &c.* and *traverses being guilty aliter, &c.* It is an unnecessary traverse, and ill upon special demurrer. 6

In a proceeding by extent, *tested* 6th July against the surety by bond, a debtor of the crown, defendant claims property in the debts and effects seized under an inquisition to make out which he pleads. That the for the extent was granted the 3th October, that the extent in reality issued on that day, that the surety had committed an act of bankruptcy the 3d of October, that a commission issued against him, *tested* that day, and that a provisional assignment was made to defendant, upon 4th October, of his goods, debts, &c. He then traverses that at the time of the inquisition the persons therein named were debtors to the surety, or that he was entitled to the goods mentioned therein.—This traverse is neither immaterial nor double, and was held good on special demurrer. 74

Covenant for rent as assignee of lessor who was seised in fee, plea that lessor conveyed away the fee before he made the lease, with a traverse, that he was afterwards seised in fee, this is too general and ill, as it ties up plaintiff to prove the estate alleged in the declaration, when any other would do. 817

Treason.

One apprehended by an officer may surrender within the year in order to traverse an outlawry. 824

Commitment for treason may be general. 8

Prisoner

I N D E X

Prisoner committed for high treason
bailed: 4

Trespass.

Lies for an accidental hurt. 596
Damage done by goods thrown down
and casually blown by the wind, not
indictable. 190
Actions of trespass against different de-
fendants are not to be joined by the
court. 420
Where the act is lawful, as the fixing
a spout, and the consequence injuri-
ous, the remedy is by case and not
trespass. 634
Taking *bona et catalla* is too general in
trespass. 637
Secundum de eo quod after a *quod cum*, is a
positive charge. 681
Laying hold of a horse, no trespass with-
out particular damage. 872
Lies for setting the end of a bridge on
the plaintiff's soil, through a highway.
1004
Lies for erecting a stall in a market with-
out agreeing for the stallage. 1238
Owner of customs liable in trespass for
wrong seizure, notwithstanding pro-
bable cause. 820
One partner brings trespass without his
companion, it must be pleaded in
abatement. *ib.*
Usum suum proprium converterunt is not
ill in trespass against baron and feme.
1094
Declaration in trespass beginning with
quod cum, amended. 1162
Trespass for putting diseased cattle
into the close, full costs though under
40 s. damages. 192
The plaintiff shall have full costs, in tres-
pass for consuming provisions. 1130
Full costs on an issue *extra viam*. 1168
Verdicts upon an erroneous judgment
will justify the party and the officer,
upon an irregular judgment the of-
ficer only. 509
Officers joining in plea with a party who
is not justifiable, shall fail. 509
Where the party and the officer join in
a justification which is ill as to one of

them, judgment shall be against both.

Page 1184

A justification under a returnable pro-
cess is ill, without shewing a return of
it. 1184
In trespass the plaintiff need only falsify
the defendant's title. 1238
Amends not pleadable to trespass for tak-
ing goods. 549
In ejectment the plaintiff has his elec-
tion to pay costs to which defendant he
pleases. 516
Damages severed in trespass. 1140

Trial.

Attorney or not, to be tried by the re-
cord. 76, 532
Seizing a house in the *East Indies* is not
triable here. 646
Where a deed comes in by incident,
the Admiralty may try whether it was
fraudulent. 761
Where either party will suggest any
thing relating to the *venire*, a copy
must be given to the other side. 235
Defendant pays costs for not trying by
proviso. 797
Counsel allowed in a capital case on a
collateral issue. 825
In capital cases the prisoner must be at
the bar when the day of his trial is
appointed. 826
If a defendant in the crown office car-
ries down the record, and it is made
a *remant* for the prosecutor's not
praying a *tales*, the recognizance is
saved. 937
In what cases the King may withdraw
a juror. 984
There must be a rule before any trial by
proviso. 1055
Costs of a special jury (except striking)
allowed on 3 Geo. 2. c. 25. 1080
Since the jury act, the *venire facias*
must be *de corpore comitatus* in the
actions excepted by the act for the
amendment of the law. 1085
Though defendants who plead to issue
are acquitted, yet damages may be as-
sessed against defaulters. 1108
If it appears no issue is joined, the jury
must be dismissed. 1117 et vide 267

Cases of trial is a wrong county aided by statute. Page 418

Where there are issues in fact and in law, the plaintiff may waive the issues in fact, and take out an inquiry upon the demurrer. 532

Trial at bar granted for the importance of the consequence. 52

Trial at bar grantable where the whole estate in demand is of value, though against several defendants. 479

Trial at bar ordered in a misdemeanor. 644

No rule for trial at bar before issue joined. 696

Crown not intitled to a trial at bar of course where there is a prosecutor. 816

Otherwise where it is. *ibid.*

In a capital case the court will not appoint a trial at bar until the defendant is present. 826

No trial at bar in a cause arising in London. 856

Attachment against a witness for not attending a trial. 810

Verdict not to be set aside for smallness of damages. 940

Writ of inquiry awarded for a defendant to supply non-assessment of damages. 1021

Where the jury drew lots, the court set aside the verdict, though according to evidence. 642

Desiring a juror to appear, no cause for setting aside the verdict. 643

Where on trying a traverse on a return no damages are given, this cannot be supplied by writ of inquiry. 1052

Venire facias de novo awarded for the omission of assessing damages on trial of a traverse of the return to a *mandamus*. 1053

In debt for selling wine by retail a *venire de novo* awarded, it not being found that the dozen quart bottles in which it was sold were retail measure. 1125

There can no *venire facias de novo* be awarded on a writ of error. 1055

In what cases a *venire facias de novo* may be awarded. 887

New trial not granted after verdict for the defendant in information of *quod warranto*. Page 101

New trial granted after a trial at bar. 58

No new trial where party might have had evidence on the first trial. 69

New trial cannot be had a second time for excessive damages. 692

No new trial where one of the defendants is rightly acquitted. 814

No new trial in a *qui tam* after verdict *pro def.* 899

Defendant convicted of forgery must appear personally when he moves for a new trial. 968

Information in nature of a *quo warranto* verdict for the defendant, no new trial to be granted after four years acquiescence. 999

No new trial for smallness of damages. 1051

No new trial can be moved for on the crown side after the signing an interlocutory judgment. 1102

New trials may be had in ejectment and after a trial at bar. 1109

New trial denied, where the jury find a matter left to them against the strength of the evidence. 1109

No new trial where there is evidence on both sides. 1144

Inferior courts cannot grant a new trial. 111

New trial not grantable to a plaintiff on a penal statute. 1233

See *Damages, Inquiry, Notice, Venue, Witnesses.*

Trover.

Goods taken in the owner's life-time and used after his decease, are converted in his life-time. 6

Removing goods whereby they are lost though a trespass, will not maintain trover. 12

In trover for money leave given to bring it into court. 14

Finder of a jewel may maintain trover. 50

Taking

I N D E X.

Taking part and spoiling the rest is a conversion of the whole. *Page* 576
 A piece of *tepee* well in trover. 738
Parcella segestrium, involucrorum et funium, Anglice, &c. sufficient in trover. 809
 Trover *de 50 peciis materie quadratae, Anglice* timber, sufficient. 810
 Trover lies against a custom house officer for seizing and carrying away goods for non-payment of duty, if they are not liable to pay it. 943
 Trover for a parcel of diamonds. 827
 Trover lies against taker in execution of bankrupt's goods, without joining the officer. 996
 A recovery in trover vests the property in defendant. 1078
 Defendant in trover can not justify the detaining goods for money laid out upon them without authority. 651
 But it may be deducted in damages. *ibid.*
 See **Tender, Bankrupt.**

Trust. See Uses.

Vagrants.

A Person must be idle as well as disorderly to be committed for a vagrant. 1103
 Child of two years old cannot be a vagrant. 631
 Justices have power to commit to hard labour idle and disorderly persons. 882
 Vagrant money ought to be raised quarterly, but a previous presentment of the grand jury is not necessary. 1028

Variance.

In setting forth a writing, more material than in a name, &c. 231
 Variance in the *Christian* name of an Earl immaterial. 316
Segrave and Seagrave no variance upon *nul tiel record*. 889
Cujusdam promissionis, and separalium promissionum, a material variance. 892

Variance by omission of a name in a warrant supplied by the writ. *Page* 909
 Judgment against the inhabitants of part of three parishes, and a writ of error of a judgment against the inhabitants of the three parishes, quashed. 1110
 If the record of *nisi prius* agrees with the declaration delivered, a variation in the issue delivered is not material. 1131
 A slight variance fatal in the name of a corporation. 787
 Variance of the sum in a judgment is not cured by a *remittit*. 1171

Venne.

Actions maintainable for causes arising beyond the seas. 614
 Seizing a house in the *East-Indies* not triable here. 646
 If the defendant has eight days in the term the declaration is delivered, he can not move to change the *venue* the next term. 211
 Rule to change the *venue* must be moved for before plea, and motion to discharge the rule must be made before replication. 858
 On a *scire facias* by baron and *feme* upon a judgment recovered by the *feme dum sola*, the plaintiffs need not alledge their marriage with a *venue*. 775
 Plaintiff may amend in the *venue*. 1162, 1202
Venne not to be changed in debt. 873
 Debt for rent may be laid where the deed was made, or the land lies. 776
 Information not amendable in the *venue*. 911
Venne not changed to lose an assises. 1180
Venne not to be changed into a county palatine, nor in *scand. mag.* 807
Venne of a cause arising in *Wales* cannot be changed from one *English* county to another. 1258
Venne changed from *London* to *Carmarthen*. 1270
Venne not to be changed into a third county without consent. 1216
 Changed

I N D E X

Changed from *London* to *Middlesex*. Page 857
 Changed from *Poole* to *Hampshire*, the corporation being interested. 874
 Where an attorney is defendant he may change the *venue* into *Middlesex*. 1049
 Attorney cannot change the *venue* to *Middlesex* where there is another defendant joined. 610
 Barrister may lay the *venue* in *Middlesex*. 822
 Sheriff may assign a bail bond out of the county, and the action may be brought where the assignment was. 727
 Action against a constable, not confined to the proper county, where he does not act in execution of his office. 446
Qu. Whether a *venue de novo* shall be awarded for uncertainty in the verdict in a capital case. 887

Verdict.

Informal issue cured by a verdict. 973
 In debt on a covenant to pay money, the verdict must go to every part of the demand. 1089
 Special verdict finding that a bankrupt bought and sold great quantities, faulty for the uncertainty. 514
 Verdict finding the election of a corporate officer, and that he had not taken the sacrament within a year; finds a good election, without a negative finding that there was no prosecution. 1145
 A recovery without seisin is imperfectly found, and no *venire facias de novo* shall go. 1185
 Where the plaintiff's cause of action is confessed, and the parties afterwards go to issue, which is found *pro def.* the verdict shall be set aside and an inquiry awarded. 873
 Assent on a special verdict severed by the court. 1036
 Intire damages in verdicts severed by the court. 1038
Postea amended by the judge's notes. 1197
 Special verdict amended by affidavit of the evidence. 514

On arguing a special verdict in a criminal case, defendant need not be present in court. Page 844, 1227
 Special verdict finding nothing as to one of the offences, is an acquittal of that offence. 845
 When on arguing a special verdict for a capital offence, it appears the defendants are guilty of a less crime, the court will not discharge them. 1019
 Verdict set aside, because the jury drew lots. 642
 A verdict must find as to the whole demand. 1089
 See Damages, Trial.

Vestry.

The right of adjourning a vestry is in the parish at large. 1045
 A select vestry, legal. 728

Ville.

Two houses in an extraparochial place are not enough to denominate a *ville*. 1004, 1071

Visitor.

Offences against the private statutes of a college are not pardoned by the act of grace. 912
 The visitor may punish one man for an act done by him jointly with others. 913
 The appointment of a bishop without his *Christian* name to be visitor, extends to his successors. *ib.*
 The visitor in his citation must pursue his authority. *ib.*

Union.

The statute for union of churches in *Ireland* does not authorise the uniting a church that is full to vacate one. 517
 Of the effect of the union of parishes after the fire of *London*. 925
 Union

Union of a prebend in *Norwich* to the
mastership of *Catherine-hall*. Page 159

Void and Voidable.

Prerogative probate without *bona nota-*
hilia only voidable. 73
Infants contracting marriage, voidable.
939

Uses and Trusts.

Infant covenants to levy a fine, he may
declare other uses when of age. 94
A fine levied to the tenant of the *præcipe*
in a recovery, shall be intended to the
use of the conusee. 17
Where the power is only to revoke, no
new uses can be declared. 584
On a covenant to stand seised for love
and affection, one named in the deed
may aver himself a relation. 934
Consideration of affection cannot raise a
power to appoint for the benefit of a
stranger. 935
Lands discharged of a trust by a sale
without notice, affected with the same
trust on their coming again to the
hands of the trustees. 243

Usury.

Indictment lies not barely for a corrupt
agreement. 816
Usury cannot be pleaded to *scire facias*
on a judgment. 1043
But it may be got at by motion to va-
cate the judgment. *ibid.*
Discounting notes beyond legal interest,
held usurious. 1243
Usury may be given in evidence on *non*
assumpsit. 498
A party to the contract no witness to
prove re-payment. 633

Wales.

MURDERS and felonies in any
part of *Wales* may be tried in the
next *English* county. 553

Certiorari lies to *Wales* on indictments
for misdemeanor. Page 704

Habeas corpus granted of course, to re-
move a prisoner from *Wales* to an *En-*
glish county. 945
Prohibition to the great session, to stay a
suit on a *subpoena* served out of the
jurisdiction. 630

Warrant.

Where power is given to a justice to com-
mit, in default of distress; if he state
in his warrant that it is certified to him
by the constable that there is none,
the commitment is good. 263
Warrant for treason executed in court.
530
In what cases a warrant is a justification
to a constable. 711, 1002

Warrant of Attorney.

Warrant of attorney filed of any term
pendente lite is sufficient. 526, 807

Warranty.

A man offers plate to sale with warranty,
and afterwards sells it to the same
person for less money, the warranty
does not extend to this sale. 414

Wills.

Where the owner of the fee with a term
to attend the inheritance makes an in-
compleat devise to carry the inheri-
tance, it shall not be set up in equity
as a devise of the term. 619
After probate of the will a court of
equity may inquire into the fairness
of a residuary devise of personal estate.
666
Original of the right of probate of wills.
667
Sealing a will is signing. 764
Though signing in the devisor's pre-
sence is not mentioned in the attesta-
tion, yet it may be a good execution.
1109
Que

I N D E X.

One of the subscribers to the attestation of a will having an annuity devised to his wife, held not to be a credible witness within the statute. *P.* 1253
 Parol evidence not admitted to determine the construction of a will. 1261
 See Probate.

Wine Licence.

The selling a single gallon of wine by an unlicensed person, in his own house, and which is drank in another, is a selling by retail, under 12 Car. 2. c. 25. 718
 Selling wine in bottles, is not selling by retail measure. 1124

Witness.

Rule upon a witness to an arbitration bond, to make affidavit of the execution. 1
 Where the bail is a subscribing witness he shall be obliged to testify. 406
 Attachment granted against a witness for not attending on a *subpoena*. 510
 A witness ought to have reasonable notice of a trial. *ibid.*
 Attachment against a witness for not attending a trial. 810
 There must be personal service on a witness to warrant an attachment. 1054
 No attachment against a witness, unless reasonable expences were tendered him. 1150
 Attorney present at putting in an answer, not obliged to give evidence of it. 1122
 What age the law will allow an infant to be witness at. 700
 A witness to a deed becoming administrator, &c. his hand may be proved. 34
 If a witness becomes interested, his deposition taken before cannot be read. 101
 Laying a wager on a cause does not incapacitate for a witness. 652
 Party whose deed is forged, no witness. 728
 Bankrupt not admitted to prove his own act of bankruptcy. 828

If the witness to a deed becomes infamous, he is considered as dead. *P.* 833
 Quaker no witness in an appeal of murder. 856
 Affidavit of one convicted of forgery not to be read to support a complaint. 110
 Party supposed to be defrauded, allowed a witness in perjury. 1225
 A bond proved by a co-obligor. 35
 Vendor witness as to title, where no covenant for warranty. 445
 Wife of *prochein amy* a witness. 506
Prochein amy no witness. 1026
 Guardian on record not a witness. 506
 Proprietor of a note a witness on an indictment for tearing it. 598
 Party to usurious contract cannot be called to prove payment. 633
 Giver of note no witness on indictment for perjury in denying an agreement relating to it. 1047
 Tenant in possession no witness in ejectment, for the landlord, as being liable for the mesne profits. 612
 Defendant in ejectment no witness on indictment for perjury at the trial. 1104
 One whose wife has an annuity devised for her separate use, is not a good witness to the will. 1253
 Wife of a party admitted to prove her husband's death. 548
 Wife witness against husband, on indictment for assault upon herself. 613
 The wife of one defendant cannot be a witness for the other on an indictment against two. 1095
 Creditor of bankrupt no witness to prove him a gamester. 507
 A creditor allowed to prove debtor not intitled to his discharge on the main act. 650
 Sheriff's bailiff no witness to prove attempt to arrest. 650
 Lords of customary manors disallowed as witness to establish a right in a lord of another manor. 658
 An informer intitled to part of the penalty is no witness. 316
 In trespass for beating his servant, the servant not admitted a witness. 414
 Serrano

I N D E X.

Servant witness in an action by master for beating him. *Page* 595, 1054
 Apprentice witness for master in action *per quod servitium amisit.* 944
 In an action against the master for the negligence of his servant, the servant having a release from the defendant is competent. 1083
 A sailor who claims wages, no witness concerning the loss of the ship. 414
 Original debtor taken as a servant, to prove the payment by another. 507
 Goldsmith's servant who overpays money is a witness in action for it again. 647
 He that apprehends himself interested, though not strictly so, is no witness. 129
 The party who excepts to a witness may call him afterwards. 480
 A witness admitted where remotely interested. 575
 A. stops bonds at the *South-sea* house, and gives bond to indemnify; he is no witness to prove the property in an action against the company's servant. 575
 Where there are two qualifications to an election of an officer, he who has but one only may be a witness. 583
 Where one defendant is fined, he is a witness for the other. 633
 The tenant in possession cannot be made a witness in ejectment. 632
 A corporator who has acted under the right claimed, may be a witness to prove the usage. 1069

Women.

A woman is capable of being a sexton, and of voting in the election. 1114
 A bastard is within the statute of *P. & M.* against taking away young women. 1161

Writs.

Calling a justice of peace a rogue, &c. indictable. 420
 VOL. II.

Words of a justice not spoke to him, not indictable. *Page* 1157
 Words of a magistrate where actionable. 617
 He is a rogue of a justice of peace, actionable. 1168
 Thief of every thing actionable. 142
 You are a rogue, and compounded, &c. of a tradesman, actionable. 762
 You did shut up my sister and murder her, actionable. 1130
 Of an attorney, he is a rogue, &c. he is no attorney, actionable. 1138
 Cheating rogue not actionable. 696
 He has received forty days wages for work that might have been done in ten days, and is a rogue for his pains, of a carpenter, not actionable. 797
 You cheated *J. S.* and stood bawd to your daughter, &c. not actionable. 1169
 Not actionable to say *A.* has had the pox. 1189
 Rogue not actionable. 304
 Where words are not actionable of themselves, in an action for consequential damages the plaintiff may give evidence of particular damages. 666
 Where words are of themselves actionable, small special damages will not carry full costs. 936
 What is not a spiritual defamation. 946
 Words tantamount to whore are within the custom of *London.* 471, 545
 Strumpet tantamount to whore in *London.* 555
 The truth of words cannot be given in evidence on Not guilty. 1200

Writs.

The principal certainties required in them. 147
 Where a defect in an original is cured by pleading over, and where not. 155
 Where variance from the register, and other matters of abatement must be pleaded. 157
 A *mandamus* may be returnable the fourteenth day after the teste. 407
 Quashing writs is not *ex debito justitiæ.* 877

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